113-33

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1883. No. 376.

THE LIVERPOOL, NEW YORK AND PHILADELPHIA STEAMSHIP COMPANY,

Plaintiff in Error,

against

THE COMMISSIONERS OF EMIGRATION.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

Donnacha, Printer, 97, 99 & 99 Park Street. Cable Telephone 507, N. Y.

Supreme Court of the United States.

THE LIVERPOOL, NEW YORK & PHILADELPHIA STEAMSHIP COMPANY,
Plaintiff in Error,

AGAINST

THE COMMISSIONERS OF EMIGRATION,
Defendant in Error.

Brief for Plaintiff in Error.

The case comes to this Court by writ of error to the Circuit Court of the United States for the Southern District of New York.

The plaintiff in error brought its action in January, 1877 (Record, p. 5), to recover the sum of one million and ninety-three thousand dollars, unlawfully demanded, exacted and received by the defendant under color of laws enacted by the Legislature of the State of New York, concerning emigrants (Record, p. 7). The defendant pleaded that by an Act of Congress passed subsequently to the commencement of this aciion, the invalid State laws had been declared valid, and the illegal exactions had been ratified, adopted and confirmed, and that the Federal Act had especially prohibited the bringing of any actions to recover moneys so exacted (Record, p. 13).

The cause came on for trial in the Circuit Court, before Judge SHIPMAN and a jury, upon the 6th day of May, 1881. After the opening of the case to the jury by the counsel for the plaintiff, a motion was made on behalf of defendant to dismiss, on the grounds that the Court had no jurisdiction, and that the Act of Congress was a complete bar to any recovery. The Court sustained the motion upon the second ground above stated, and directed a verdict for the defendant. The plaintiff duly excepted (Record, p. 23).

Assignment of Errors.

The plaintiff in error assigns for error the ruling of the Trial Court, that the Act of Congress of June 19, 1878, was a bar to any recovery in this action, and the direction to the jury to find a verdict for the defendant (Record, p. 23).

I.

There is but one question before this Court, namely, the validity and effect of the Act of Congress of June 19th, 1878, as a bar to any recovery in this action.

At the very outset of the trial the whole controversy was narrowed to the one point, whether the Act of 1878 was a shield to the defendant for all the illegal exactions complained of, and a conclusive bar to this action.

No other question whatever was passed upon, or considered by the Court below.

By specifying only two grounds for the motion made, the defendant waived all others, and conceded that the ruling of the Court upon them would be in plaintiff's favor.

Of the two grounds specified, and thus brought to the attention of the Court, one was impliedly overruled, and the verdict was directed solely upon the remaining ground—that the Act of 1878 was a bar to any recovery in this action.

The record presents, therefore, but that one question to be argued before this Court.

It is clearly conformable to principle and reason, that an inferior tribunal should not be convicted of error, when it has not decided against a given proposition, but has not even had its attention called to it. The rule is established, that an appellate court is only to review the rulings actually made below.

Indeed, the rule is so far enforced in this Court, that *not even the consent and request of both parties* will induce the Court to depart from it.

We cite in support of this proposition the following cases:

1. The Circuit Court had dismissed a bill for want of jurisdiction. The record contained all matters required by either party for a final disposition of the case. Before the argument counsel asked whether the Court would permit argument upon the merits, so that a final decree could be rendered. After advisement, the Court decided to hear argument only upon the point of jurisdiction.

McDonald vs. Smalley, 1 Peters, 620, 621.

2. A feigned issue was awarded to try certain questions, and exceptions were taken to various rulings. The cause then came on before the same Judges, upon the Chancery side of the Court, but the points raised by the bills of exceptions were not argued. Held, upon appeal from the decree that the

points not raised below, on the hearing upon the chancery side of the Court, could not be argued before the appellate court.

"It is a general rule of practice, that *no point arising on the pleadings or evidence* in an appellate court shall be made, which was not brought to the notice of the inferior Court."

Brockett vs. Brockett, 3 How, 691, 692.

3. "One answer to the suggestion is that no objection as to the *bona fides* of the grant was taken before either of the tribunals below, when it should have been made, if relied on by the Government, so as to have given the claimants an opportunity to have met it."

U. S. vs. Larkin, 18 How., 557, 561.

4. "The Court sustained the demurrer upon the first ground * * * The opinion of the Court is limited to the first point, and ours will be confined to that subject."

Hall vs. Wisconsin, 103 U. S., 8.

See also

Wilson vs. McNamee, 102 U. S. ,574.
Retzer vs. Wood, 108 U. S.

On behalf of the plaintiff in error, therefore, it is insisted that the only question to be argued is the validity and effect of the Act of June 19th, 1878, as a bar to any recovery in this action.

II.

A reference to the state of facts, existing at the time when the Act of June 19, 1878, was passed,

will be convenient before presenting the objections to its validity.

Prior to the enactment now under review, there was no valid law in existence obliging the plaintiff in error to pay head money. Various States had attempted to compel such payments, but the steamship companies had steadily resisted the enforcement of these statutes, yielding temporary compliance under protest, and pursuing in an orderly and legal manner the proper proceedings before the Courts to obtain protection for the future and redress for the past. In these various proceedings they had invariably in the end succeeded. One after another of these State statutes had been brought to the bar of this Court, and without exception had been pronounced unconstitutional and void, and hence no law. Under the familiar maxim, it must be presumed that the companies knew during all this time that the statutes were void. They rightfully could expect the return of all moneys which had been extorted from them under color of the void laws. *Non constat* they would have continued to carry on the business of bringing emigrants to this country, had there been any legal obligation to pay these head moneys. In the end this Court declared that there *was no such obligation*. We refer to these decisions, without detailed consideration of them.

Smith vs. Turner, 7 How., 283; Norris vs. Boston, 7 How., 283, known as the Passenger Cases.
Commissioners vs. North German Lloyd, 92 U. S., 259.
Henderson vs. The Mayor, 92 U. S., 259.
Chy Lung vs. Freeman, 92 U. S., 275.

These judgments established conclusively:

1. That the transportation of passengers is a

branch of commerce, which Congress has exclusive power to regulate.

2. That laws of the character of the various State statutes involved in these cases, were an invasion of this exclusive power entrusted to Congress.

3. That all these statutes were consequently unconstitutional and void.

4. That all proceedings under the unconstitutional statutes were illegal and void.

After these solemn and conclusive adjudications repeatedly made by this Court, the Act of 1878 was passed declaring that all acts done under these unconstitutional and void statutes should be valid, and that the Courts should refuse redress therefor.

Since the passage of this act, this Court has reaffirmed its former rulings in regard to the main question.

People vs. Compagnie Transatlantique, 107 U. S., 59.

III.

The act of June 19, 1878, is invalid.

We maintain the invalidity of the Act of June 19, 1878, upon two distinct lines of argument:

1. It is not only unauthorized by the Constitution, but is forbidden by the express provisions of that instrument.

2. It transcends the inherent powers of a legislature which is untramelled by limitations of organic law, *a fortiori*, it cannot be enacted by the Congress of the United States.

The grounds upon which we ask the reversal of this judgment may be briefly stated thus:

I. The Act of June 19, 1878, is condemned by the constitution of the United States, because,

1. It does not give the consent of Congress to any law laying imposts or duties upon imports or exports, inasmuch as alien passengers are neither imports nor exports.

2. It violates the constitutional requirement of uniformity in all imposts and duties.

(*a*) It is not a "direct tax."

(*b*) It authorizes imposts or duties of different amount in different States.

(*c*) It authorizes their collection from some, and not others, of the same class.

3. It violates the constitutional prohibition against preferences, in any regulation of commerce, of the ports of one State over those of another State.

4. It violates the constitutional prohibition against depriving persons of property without due process of law.

(*a*) The right to recover back these illegally exacted head moneys was a vested right of property.

(*b*) The Act of 1878 is not due process of law.

5. It interferes with the obligations of contracts, inasmuch as its operation amounts to a denial of rights already vested, by forbidding the use of remedies to enforce such rights. Congress cannot aid the States in such procedure.

II. The act will not be construed as retrospective and is not a bar to this action commenced before its passage.

III. The enactment of the provisions contained in the Act of June 19, 1878, is beyond the inherent powers of any Legislative body.

1. It destroys vested rights of property.
2. It is a usurpation of judicial functions.

IV.

No authority is conferred upon Congress by the constitution to enact the law of June 19, 1878.

The act proceeds upon the notions, first, that the prior assent of Congress could have authorized the various State Legislatures to pass the statutes attempted to be validated, and secondly, that subsequent adoption and ratification were equivalent to prior assent.

The act is as follows:

"CHAPTER 327.

"AN ACT TO LEGALIZE THE COLLECTION OF HEAD MONEYS ALREADY PAID.

"Be it enacted, &c., That the acts of every State and municipal officer, or corporation of the several States of the United States, in the collection of head moneys, prior to the 1st day of January, 1877, from the master, consignee, or owner of any vessel bringing passengers to the United States from a foreign port, pursuant to the then existing laws of the several States, shall be valid, and no action shall be maintained against any such State or municipal officer, or corporation, for the recovery of any moneys so paid or collected prior to said date."

U. S. Statutes at Large, Vol. 20, p. 177.

We start with the fact, that various State statutes had been passed, which this Court had, prior to June, 1878, declared to be unconstitutional and void.

No general power resided in Congress, either before or after such adverse decisions, to authorize or to ratify statutes of this character.

Congress has only such powers as the Constitution expressly or impliedly confers, and its every enactment must find affirmative warrant in that instrument.

Whenever any power is claimed to reside in Congress, those invoking its aid must point out the constitutional provision authorizing it.

The affirmative is on the defendants in error to show the constitutional warrant for this law.

Attempts have been made to support the Act of June 19th, 1878, (1) as a regulation of commerce, and (2) an exercise of the power given to Congress in Article I., Section 10, Subd. 2.

The first claim we consider in Point VII.

As to the second claim it is founded on the following language of the Constitution:

"No State shall, *without the consent of the Congress*, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any State on imports and exports, shall be for the use of the Treasury of the United States: *and all such laws shall be subject to the revision and control of the Congress.*"

Three propositions may be asserted in regard to this clause of the Constitution:

1. The consent of Congress can only authorize a State law which lays imposts or duties on imports or exports.

2. A State may lay only such imposts or duties upon imports or exports as are absolutely necessary for executing its inspection laws; and this State action is subject to the revision and control of the Congress.

3. The various State laws in regard to head moneys were not "absolutely necessary for executing" any

inspection laws. The only new feature in the case now at bar is, that Congress has undertaken to give a retrospective "consent" to these laws.

V.

Prior consent would not have validated these laws as laws laying an impost or duty upon imports or exports. Alien passengers are neither imports or exports.

The words "*imports and exports*" have received a judicial definition, fatal to the case of the defendants in error.

Following the rule laid down in Brown vs. Maryland, 12 Wheaton, 437, this Court has more or less strongly repudiated the idea of persons being either imports or exports, in

New York vs. Miln, 11 Peters, 102, 136.
Passenger Cases, 7 How., 283, 420, 442, 447.
Crandall vs. Nevada, 6 Wall., 35, 41.
People vs. Compagnie Transatlantique, 107 U. S., 59.

In the latter case, Mr. Justice MILLER holds that no competent authority has ever decided that the words imports and exports are used in the constitution as applicable to free human beings. He says, "We know of nothing which can be exported from one country or imported into another that is not in some sense property—property in regard to which some one is owner, and is either the importer or the exporter. This cannot apply to a free man. Of him it is never said he imports himself, or his wife or his children. * * * We conclude that free

human beings are not imports or exports within the meaning of the constitution."

This case arose under an act passed in 1881, by the New York Legislature, imposing a head money tax, professedly, in aid of the so called "inspection laws of the State.

Laws of 1881, Ch. 432.

This act directed the *net* produce of all duties collected under it to be paid into the United States treasury. It was an obvious attempt to proceed under the same constitutional provision as that relied upon to support the Federal Act of June, 1878. The Circuit Court for the Southern District of New York, held that this law was unconstitutional and void in *People vs. Compagnie Transatlantique, 10 Federal Reporter, 357;* and the judgment was affirmed by this Court in 107 U. S., 59.

If passengers are neither imports or exports there is an end of all State laws seeking to tax alien passengers; for the permission to tax, *even if the conditions are fulfilled*, is only a permission to tax *imports and exports*. To no other tax can the consent of Congress be given, under the constitutional provision referred to.

VI.

The Act of June 19, 1878, is within the express prohibition of Article I., Section 8, Subd., 1 of the Constitution.

The Act of 1878 not being within the qualified power of Congress to assent to the imposition of certain specified imposts or duties by State legisla-

tion, we inquire whether it is a constitutional exercise of any other power vested in Congress.

It will hardly be claimed that because Congress undertook to act in this instance through State officers or instrumentalities it could thus escape the limitations placed by the Constitution upon any direct and immediate exercise of its powers. The most formal adoption by Congress of a State Act could not well do more than to give to the latter the "same validity, *as if its provisions had been especially made by Congress.*"

Gibbons vs. Ogden, 9 Wheaton, 207.

It follows, then, that all constitutional restrictions, which would have been applicable to an Act of Congress, originally and directly laying imposts or duties upon the admission of emigrants, are equally applicable to the Act of June 19th, 1878, in which we must consider to be embodied all the provisions of the various State statutes, which it virtually re-enacts. So considered, it is claimed to be an act wherein Congress undertakes to exercise its undoubted power "to lay and collect taxes, duties, imposts, and excises." But that power has no less undoubted limitations. One of these limitations is that "all duties, imposts, and excises, shall be uniform throughout the United States."

Constitution, Article I., Section 8, Subd. 1.

The Act of 1878 does not lay a "direct tax," and all others must be uniform.

Hylton vs. U. S., 3 Dall., 171.
Pacific Co. vs. Soule, 7 Wall., 433.
Veazie Bk. vs. Fenno, 8 Wall., 533.
Springer vs. U. S., 102 U. S., 595.

The uniformity required by this clause of the Constitution is only fulfilled when the same duties are

levied in all ports, and where income taxes and excises operate alike.

Loughborough vs. Blake, 5 Wheat., 317.
Veazie Bk. vs. Fenno, 8 Wall., 533.
U. S. vs. Riley, 5 Blatchf., 204.

A.

In re-enacting "the then (*i. e.*, "prior to the first day of January, 1877,") existing laws of the several States," Congress has disregarded this positive mandate of the Constitution, and has attempted to lay duties and imposts of varying amount in different States.

It assumes to ratify the collection of head moneys "already paid." The laws of the different States had levied taxes of different amounts. They were as follows:

(*a*) In New York.

Laws of 1847, Ch. 431, § 2.....	$1 00
Laws of 1851, Ch. 523, § 7.....	1 50
Laws of 1853, Ch. 224, § 13.. ...	2 00
Laws of 1871, Ch. 475, § 1.....	1 50

(*b*) In Massachusetts.

Act of April 20th, 1837, §§ 1, 2, and 3.....	$2 00
See 7 How., pp. 285–6.	
Laws of 1848, Ch. 313, § 5.....	2 00
Laws of 1850, Ch. 105, § 1...	2 00

Laws of 1852, Ch. 279, § 1. This Act left the amount to the discretion of the Superintendent, merely fixing a minimum of $2.

Laws of 1853, Ch. 366, § 1, allows the Commissioners to commute at their discretion the bonds taken by Superintendent.

It will be seen that while several of these Acts leave the amount of commutation the same, they vary the provisions as to bonds.

(*c*) In California.

The amount of commutation in place of bonds was left to the discretion of the Commissioner.

Hittell's Codes and Statutes of California, § 2960.

See Chy Lung vs. Freeman, 92 U. S., 277–8.

(*d*) In Louisiana.

The amount is $2.

Ray's Digest of Statutes of Louisiana, Vol. II., p. 3, § 1723.

If Congress had undertaken to provide directly for the collection of duties or imposts upon emigrants, and designated expressly upon the face of the act varying amounts to be collected, according as the emigrant landed in New York, Massachusetts or Louisiana, it would have required much sophistry to have upheld it.

If Congress had further provided that when the emigrant landed in any one of the States, the amount to be collected might be determined at the discretion of the collecting officer, appointed by such State, no one probably would have been found willing to argue that such legislation was valid.

Can it be that because the "several States," prior to January 1, 1877, had passed "then existing laws," which had undertaken to lay these varying imposts or duties, it is only needful for Congress to ratify what neither it, nor the State Legislatures, have original power to enact, in order to create a valid imposition, and thus evade the Constitutional prohibition? The bare statement of such a proposition is sufficient to cause its rejection, but the full endorsement by this Court of such a claim is necessary, in order to sustain the judgment of the Court below.

B.

There is still another way in which Congress has violated the prohibition under consideration. Uniformity demands not only that the imposts to be collected shall not be unequal, but also that they shall be collected from all alike, who belong to the class affected by the legislation. But;

FIRST. This act does not assume to tax all common carriers who, under the "then existing laws of the several States," had brought emigrants to this country; and

SECOND. The act does not undertake to permit "State or municipal officers or corporations" to proceed to collect all unpaid imposts, which had become due and payable, under the provisions of the then existing laws. It is "an act to legalize the collection of head moneys *already paid.*"

Its effect is this: Acts already done are made valid. If head moneys have been collected under these State laws, they may be retained. No action shall be brought or prosecuted for their recovery. On the other hand, no further steps shall be taken to compel payment of moneys not already collected. If any steamship companies have defied this unconstitutional law, refusing either to give the bonds, or to pay the commutation demanded, they shall go free forever. If they have given the bonds, instead of paying the commutation, these bonds shall never be enforced. But if they have under compulsion and with protest complied with the void law, until they tested their rights by an orderly resort to the Courts, they shall lose all moneys so paid. The law in terms validates the originally illegal tax only as to those who have yielded to it a compliance. It sets a premium upon the conduct of those who have exercised the dangerous right of deciding for themselves upon the constitutionality of a law, passed

with all requisite formality by a Legislature of one of the States.

We refer in this connection to the reasoning of the opinion in the case of *Forster vs. Forster, 129 Mass., 559*, where the Conrt holds that a statute is invalid because in did not operate alike upon all parties affected by it. The Court also points out the distinction between confirming irregular taxation so that it can be enforced *in futuro*, and undertaking to validate previous seizures or sales illegal when made.

We admit that if any discrimination be legal, the question, whether this is judicious discrimination, cannot properly be addressed to this Court. But the fact that this is the actual result of the discrimination made by the Act of 1878 lends an added force to the question, whether any discrimination can be legal.

VII.

The Act of June 19, 1878, is within the express prohibition of Article I., Section 9, Subd. 5 of the Constitution.

If the act under review is sought to be upheld as an exercise of the power to regulate commerce it is void.

The power to regulate commerce, given broadly in Article I., Section 8, Subd. 3, is materially restricted by Article I., Section 9, Subd. 5, "which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

We have already shown by reference to the varying laws of the several States, which are attempted to be validated, that preference is given.

Passenger Cases, 7 How., 283, 414.
Alexander vs. R. R. Co., 3 Strob., Law, 594.

It is quite immaterial to this discussion whether the admission of emigrants be considered advantageous, or the reverse, to the interests of the State where they land. Are they valuable and desirable additions to the community? Then a preference is given by this legislation to the State in which the lower impost is to be collected. Is their coming a misfortune to be averted? Then the preference is in favor of that State which is permitted to demand a higher impost upon their admission. In either case, the laying of imposts or duties of different amounts discriminates between the "several States," and operates as a preference, given by a regulation of commerce, to the ports of one over those of another. If lawful to any extent, there is no limit to which it might not be carried. This preference, which the Constitution carefully forbade Congress to give directly, it is attempted in the guise of ratification to give indirectly.

VIII.

Subsequent ratification is not equivalent to previous assent in this instance, because of rights intervening.

It is hardly necessary to argue that if Congress could not constitutionally have passed an act similar to the first clause of the Act of 1878, the effect

of which would be to authorize the several States to make their own head money laws, it certainly could not pass a retrospective law legalizing the State legislation after the head moneys had been paid. For, as is said by Judge COOLEY in his work on Constitutional Limitations, page 381*, "The healing statute must in all cases be confined to validating acts which the Legislature might previously have authorized. It cannot make good retrospectively acts or contracts which it had or could have had no power to permit or sanction in advance."

But assuming that Congress could have authorized the States to levy the head moneys in the method directed by the obnoxious laws, still, as a right of property has meantime been vested in the plaintiff to recover back the moneys paid, the Act of June, 1878, has not the force of an assent by Congress given prior to the collection of the illegal duties.

In Mattingley vs. District of Columbia, 97 U. S., 690, this Court holds that "Congress may legislate within the District of Columbia respecting the people and property therein, as may the Legislature of any State over any of its subordinate municipalities. It may therefore cure irregularities and confirm proceedings which, without the confirmation, would be void because unauthorized, *provided such confirmation does not interfere with intervening rights.*"

IX.

The Act of June 19, 1878, is within the prohibition contained in the Fifth Amendment.

A.

The right to recover the head moneys illegally exacted was a vested right of property.

"A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Where it springs from contract or from the principles of the common law, it is not competent for the Legislature to take it away."

*Cooley on Con. Lim., 362.**

The payment of these head moneys under duress created at common law an obligation to return them. The rule that such return might be had in an action of assumpsit, is too well established to be overthrown. The law implied a promise to repay money so obtained, which Courts must enforce.

Lourey vs. Bourdieu, 2 Doug., 472.
Irving vs. Wilson, 4 Term Rep., 485.
Elliott vs. Swartwout, 10 Peters, 156.
Collector vs. Hubbard, 12 Wall., 1.

The Act of June, 1878, undertook to release these defendants, and all those similarly situated, from such promises, and to prohibit all courts from enforcing them. Prior to that act this promise was property belonging to the plaintiff, and the act seeks to divest him of that property. Such property could have been assigned, either conventionally or by operation of law. It would have devolved upon the personal representatives of an individual. By the law of the land the plaintiff had a right to maintain an action at law for the recovery of the moneys illegally exacted. In the very case at bar, the plaintiff in error was engaged in the active prosecution of its claim by a lawful remedy. This action had been brought in January, 1877, and had been actually pending for almost eighteen

months. At this juncture Congress intervened, and undertook to annihilate this right of property, and bar the pending action by an absolute and comprehensive edict against its further maintenance. The judgment below has not only turned out of Court a plaintiff who came with an incontestably valid cause of action, but has mulcted it in costs *pro falso clamore*.

It is proper that we should notice two cases, which may be claimed to establish that there is no such vested right of property, and no such implied promise, as we have asserted.

We refer to

Cary vs. Curtis, *3 How.*, *250*.
And *Collector vs. Hubbard*, *12 Wall.*, *1*.

The facts in the case at bar do not make it analogous to those cases. They are not decisive.

In the case of *Cary vs. Curtis*, the collector had illegally exacted moneys after the passage of the statute of the United States of March 3, 1839, which expressly directed the payment into the United States Treasury of all moneys collected by Revenue officers *after the passage of the Act*, including such as were paid under protest, and forbade any action against the collector to recover the moneys turned into the Treasury. The act also provided a mode of redress by application to the Secretary of the Treasury, and it is expressly held by the Court, did not deprive the plaintiff of ample legal remedies to prevent or redress the wrong complained of. The validity of the statute being assumed, it was the duty of the defendant to obey it. Had he retained the moneys, the United States could have sued for, and recovered them. The law would not be guilty of the injustice and absurdity of *implying a promise* on the part of the collector, either to violate his duty, or to pay the moneys twice; and the statute could right-

fully shield him from vexatious actions founded upon such an alleged promise.

The act was passed March 3, 1839. The payment of the duties sought to be recovered was made July 3, 1841. The decision of the Court was in substance this: (1) The section as a part of the public law, must be taken as notice to all revenue officers, and to all importers, and others dealing with those officers in the lines of their duty. (2) With full knowledge that the collectors had no discretion over money paid to them after the passage of the act, and especially that the law provided that they should never retain it to await the result of any contest concerning the right to it, and that as regards money so paid to collectors, the statute had converted those officers into mere instruments for its transfer into the Treasury, the importer paid his money. (3) An action for money had and received against an agent cannot be maintained where the agent has no power to retain the money from his principal on receiving a warning not to part with the fund. (4) That so far from there existing under such a state of facts the implication requisite to support a recovery *ex equo et bono*, the correct inference seemed to be, that payment under such circumstances must, not only *ex equo et bono* nay *ex necessitate*, and in despite of objections made at the time, be taken as being made in conformity with the mandate of the law and the duty of the officer, but would render void an express promise by him founded upon a violation both of the law and of his duty.

The case of the Collector vs. Hubbard, 12 Wall., 1, arose under the Internal Revenue Act of July 13, 1866. The suit was brought August 9, 1867.

It was expressly conceded by the Court that the prohibition in the Act of 1866 against maintaining actions (a prohibition certainly as sweeping as that

in the Act of 1878), *would not affect a pending action.*

The case was decided in favor of the collector upon the grounds:

1st. That the plaintiff was seeking to enforce a right of action arising not at common law, but pursuing a remedy given by statute, and hence liable to be lost by a change or repeal of the statute.

2d. That the right of the plaintiff to recover at all, did not depend upon an implied promise as at common law.

3d. That on the merits the tax was legally exacted.

Previous to these cases, the Court had decided in *Elliott vs. Swartwout, 10 Peters, 156,* which arose under the Act of July 14, 1832, that a promise could and would be implied to repay moneys wrongfully exacted under a statute, which did *not* require the collector to pay them over, despite the protest.

From the three cases last cited this rule may fairly be deduced: That the law will imply a promise to repay moneys illegally exacted, unless a valid statute in operation at the time of payment made it the collector's duty to disregard any protest, and pay them over in another direction.

Such a rule does not touch the case at bar. These head moneys were exacted under statutes which this Court has emphatically and repeatedly declared to be unconstitutional and void, and hence *no law.* A promise to repay them, therefore, immediately came into existence.

The question before the Court in the case at bar, differs *toto caelo* from that in Cary vs. Curtis, and Collector vs. Hubbard.

The pending question is this: Can a *subsequent* statute destroy, by the mere will of the Legislature, vested rights of property, and valid rights of action for their enforcement? To that question, we submit,

there can be but one answer. There is certainly a wide difference between a statute seeking to exempt an official from vexatious actions, brought against him because of his compliance with its valid provisions, and founded upon an alleged implied promise, where any such implication would be unjust and absurd, and another statute which seeks to forbid the further maintenance of an action which it finds in existence, and which was rightfully brought to enforce a promise actually and justly implied by the law from an unlawful and extortionate act committed under color of the authority of a void and unconstitutional statute.

B.

A statute, seeking ipso facto to destroy vested rights of property and valid rights of action, violates the constitutional guaranty of due process of law.

The fifth amendment of the constitution is obligatory on Congress.

Barron vs. The Mayor, 7 Peters, 243.

A binding implied promise to repay about eleven hundred thousand dollars being property, could the Act of 1878 destroy it? It undertook to do so. Without notice to the owner, without any judicial proceedings, by the mere arbitrary word of power, it assumed to annihilate this property, and to forbid all courts to entertain any action for its recovery. It was not confiscation, for there is no offense charged or pretended, and the Government does not claim to take possession of the property in question. It was not the exercise of eminent domain (even if it be conceded that *a chose in action* is subject to the right of eminent domain), for there is no proposal of

compensation, and there is no public use. It is not a mere change of remedy, for it does not leave the parties any substantial remedy, but deprives them of all remedy. It was simply an attempt to devote property of one party to the benefit of his opponent.

Reichart vs. Felps, 6 Wall., 160.

In the Woodworth Planing Machine Case (14 Howard, 539), this Court says:

" Time is the only thing upon which they legislate, and any other construction would make the legislation of Congress, on these various special laws, inconsistent with itself, and impute to it the intention of dealing out a different measure of justice to purchasers of different kinds of implements and machines; protecting some of them, and disregarding the equal and just claims of others. *And if such could be the interpretation of this law, the power of Congress to pass it would be open to serious objections. For, it can hardly be maintained that Congress could lawfully deprive a citizen of the use of his property* after he had purchased the absolute and unlimited right from the inventor, and when that property was no longer held under the protection and control of the General Government, but under the protection of the State, and on that account subject to State taxation. The fifth amendment to the Constitution of the United States declares, that no person shall be deprived of life, liberty or property, without due process of law. The right to construct and use these planing machines had been purchased and paid for without any limitation as to the time for which they were to be used. They were the property of the respondents. Their only value consists in their use. *And a special Act of Congress, passed afterwards, depriving the appellees of right to use them, certainly could not be regarded as due process of law.*"

Such statutes as this have been declared to be void, because depriving persons of property without due process of law.

Upon this principle has depended the ruling in the following cases:

Congress cannot pass an act depriving persons of their vested rights of action for previous illegal arrest.

Johnson vs. Jones, 44 Ills., 162–3.
Griffin vs. Wilcox, 21 Ind., 372.

Nor can a statute authorize the seizure and forfeiture of property without notice to the owner, or any judicial proceedings.

Rockwell vs. Nearing, 35 N. Y., 305.
Greene vs Briggs, 1 Curt., 311.
Greene vs. James, 2 Curt., 187.

A statute cannot deprive a husband of a vested interest in a legacy bequeathed to his wife.

Westervelt vs. Gregg, 12 N. Y., 209, 211.
Norris vs. Beyea, 13 N. Y., 288.
Ryder vs. Hulse, 24 N. Y., 375.

The right of property in an existing stock of liquors cannot be destroyed by the statute.

Wynehamer vs. People, 13 N. Y., 387, 392, 420–3, 437, 459.

A statute cannot ratify and confirm a void tax sale.

Conway vs. Cable, 37 Ills., 88–9.

A statute cannot authorize the laying out of private roads *in invitum*.

Taylor vs. Porter, 4 Hill, 145–6.

A statute cannot create an obligation founded upon circumstances which, at the time, gave rise to none.

Medford vs. Learned, 16 Mass., 215.

To the same effect is an expression of opinion in
People vs. Supervisors, 43 N. Y., 135.

A statute cannot declare a sheriff's deed to be valid, which the Court has previously adjudged to be void.
Menges vs. Dentler, 33 Penn. St., 495.

A release of dower by a minor, voidable when made, and afterwards avoided, cannot by a subsequent statute be made valid.
Adams vs. Palmer, 51 Me., 490.

X.

The statute of June 19th, 1878, is void, because it seeks to impair the obligation of a contract.
Article 1, Sec. 10, Sub. 1.

Laws relating to the validity, construction, discharge and enforcement of a contract which are in force at the time and place of making the contract, enter into and form part of the contract itself.

Antoni vs. Greenhow, 107 U. S., 769.
Bronson vs. Kinzie, 1 How., 317.
Planter's Bk. vs. Sharp, 6 How., 327.
Walker vs. Whitehead, 16 Wallace, 317.
Murray vs. Charleston, 96 U. S., 448.
Edwards vs. Kearzey, 96 N. Y., 607.
Louisiana vs. New Orleans, 102 U. S., 206.
Kring vs. The State, 107 U. S., 221, and other cases cited by Mr. Justice MILLER.

The word "laws" included judicial decisions as well as statutory law.

Ohio Life & Trust Co. vs. Debolt, 16 How., 432.
Gelpcke vs. City of Dubuque, 1 Wall., 206.
Butts vs. Muscatine, 8 Wallace, 575.
City vs. Lamson, 9 Wallace, 477.
Township vs. Talcott, 19 Wallace, 666.
Douglass vs. County of Pike, 101 U. S., 687.

Although Article I., Section 10, Subdivision 1, does not apply to Congress in words, yet Congress cannot by authorization or ratification give the slightest effect to a State law or constitution which is in conflict with the Constitution of the United States.

That instrument is above and beyond the power of Congress and the States, and is alike obligatory upon both.

So an act of Congress, passed for the purpose of enabling a State to impair the obligation of a contract, would be void.

White vs. Hart, 13 Wallace, 646.
Gunn vs. Barry, 15 Wallace, 610.

Here it has been solemnly decided by this Court that the statutes of the States are unconstitutional.

The avowed purpose of the Federal statute is to enable the State and its own officials and municipal officials to resist and defeat the collection of claims arising from enforced payments made under the unconstitutional statutes. The effect of the act is to enable the States to impair the obligation of the contract. The act itself is, therefore, unconstitutional.

The only exception to the general rule that laws applicable to the case, which are in force at the time

and place of making the contract, enter into and form part of the contract itself, is where changes in the form of action or mode of procedure do not amount to the impairment of the obligations of a contract because an adequate and efficacious remedy is left.

Antoni vs. Greenhow, 107 U. S., 769.

Wherever the result is produced that no adequate or efficacious remedy is left the act is within the prohibition of the Constitution and as to that void.

Von Hoffman vs. Quincy, 4 Wallace, 535.

In the case at bar not only is there no adequate and efficacious remedy left, but all remedy whatever is expressly prohibited.

When the contract here in question was entered into ample remedies existed. All were taken away by the Federal statute. Not a vestige was left. Every means of enforcement was denied, and this denial, if valid, involved the annihilation of the contract. But it is not valid. For the express dictation and approval of a State statute to the like purport would have been without effect. Congress has no power to supersede the National Constitution.

White vs. Hart, 13 Wall, 649.

XI.

The statute not being retroactive, does not apply to the suit at bar.

Pending suits are not affected by such acts.

Collector vs. Hubbard, 12 Wall., 14.

Courts refuse to give statutes a retroactive construction unless the intention is so clear and positive as by no possibility to admit of any other construction.

The reason for this rule is stated by Mr. Justice COOLEY, in his work upon Constitutional Limitations.

"It is always competent to change an existing law by a declaratory statute; and where the statute is only to operate upon future cases it is no objection to its validity that it assumes the law to have been in the past what it is now declared that it shall be in the future.

"But *the legislative action cannot be made to retroact upon past controversies and to reverse decisions which the courts, in the exercise of their undoubted authority, have made—for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form—since the Legislature would in effect sit as a court of review, to which parties might appeal when dissatisfied with the rulings of the courts.*"

Cooley's Constitutional Limitations, 5th Ed., page 113.

"As a general rule for the interpretation of statutes, it may be laid down that they never should be allowed a retroactive operation where this is not required by express command or by necessary and unavoidable implication. Without such command or implication, they speak and operate on the future only. *Especially should this rule of interpretation prevail where the effect and operation of a law are designed, apart from the intrinsic merits of the rights of parties to restrict the assertion of those rights.*"

DANIEL, J., in Murray vs. Gibson, 15 How., 422.

It is a general rule of jurisprudence that it is of the very essence of a new law that it shall apply to future cases, and such must be its construction unless the contrary clearly appears.

Catron, J., in McEwen vs. Den, 24 How., 242.

A statute must be assumed to act prospectively only if capable of such construction unless its terms indicate a different intent.

Goillotel vs. The Mayor, 87 N. Y., 441.

In *New York & Oswego Midland R. R. Co. vs. Van Horn, 57 N. Y., 477*, Judge EARL says: "Such an act comes in direct conflict with the constitutional provision that no person shall be deprived of life, liberty or property without due process of law. But this section should not be construed as to give it retroactive effect. We must not assume that the Legislature meant to violate the Constitution. It is always to be presumed that a law was intended, as is its legitimate office, to furnish a rule of future action, to be applied to cases arising subsequent to its enactment. A law is never to have retroactive effect unless its express letter or clearly manifested intention requires that it should have such effect. If all its language can be satisfied by giving it prospective operation, it should have such operation only."

In *Dash vs. Van Kleeck, 7 Johns., 499*, KENT, Ch. J., says: "We are to presume out of respect to the law giver that the statute was not meant to operate retrospectively. * * * A statute ought never to receive such a construction if it be susceptible of any other."

In *Jackson vs. Van Zandt, 12 J. R., 168*, THOMPSON, Ch. J., says: "It is a first principle in legislation that all laws are to operate prospectively."

In *Sayre vs. Wisner, 8 Wend, 662*, SAVAGE, Ch. J., says: "A statute never ought to have such a

construction as to divest a right previously acquired if it be susceptible of any other, giving it a reasonable object and full operation without such construction."

The same learned Judge says in *Hackley vs. Sprague, 10 Wend., 114:* "All statutes are to be construed prospectively and not retrospectively, unless they are otherwise incapable of a reasonable construction."

See Sinking Fund Cases, 99 U. S., 721.

The true rule is to give a change of judicial construction in respect to a statute, the same effect in its operation on contracts and existing contract right that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decisions is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment.

Douglass vs. County of Pike, 101 U. S., 687.

XII.

The Act of June 19, 1878, is entirely beyond the scope of any just definition of legislative powers, and a fortiori beyond the powers of Congress.

A.

In the preceding points we have sought to show that in the written Constitution from which Con-

gress derives all its powers, there is not only no grant of power, upon which the Act of 1878 may rest, but that the express limitations of that instrument have been disregarded in this attempted legislation. There are still other considerations depending upon the general nature of legislative power and its inherent limitatations. Laying aside now all reference to the written constitution we submit that the Act of June 19, 1878, exceeds the boundaries of legislative power in seeking to divest an absolute and vested right of property, in the manner attempted.

We concede at the start that cases may be found, wherein this Court has declared that a statute is not to be declared void, because it destroys a vested right of property, unless it impairs the obligation of a contract, or violates some other express constitutional provision.

Satterlee vs. Matthewson, 2 Peters, 412

Such language, however, will be found confined to cases coming to this Court from a State Court, and means only this, that this Court in such cases has no general power to supervise State statutes. But all the Federal Courts have such general power of supervision over the Federal Legislature, and may declare its acts void, wherever *for any reason* its rightful powers have been exceeded. We submit that the Federal Courts, *in cases of original jurisdiction* must thus pass judgment upon both State and Federal statutes.

The general principle underlying this position is that it is for the Legislature to say what the law *shall be;* it is for the Courts, and for them alone, to say what *it is, or has been.*

Ogden vs. Blackledge, 2 Cranch, 272.
People vs. Supervisors, 16 N. Y., 424.

The special application of the general principle was considered in an early case in this Court, wherein Chief Justice MARSHALL most forcibly pronounced against the existence of such legislative power.

The power of the Legislature is not competent to the "annihilation" of a title.

Fletcher vs. Peck, 6 Cranch, see p. 135.

"The question whether the act of transferring the property of an individual to the public be *in the nature of the legislative power, is well worthy of serious reflection.*"

Id., see p. 136.

The validity of such an act "might well be doubted," though passed by the Legislature of "a single sovereign power."

Id., see p. 136.

A Legislature is restrained "by general principles, which are common to our free institutions * * * from passing a law, whereby the estate of the plaintiff in the premises * * * could be constitutionally and legally impaired, and rendered null and void."

Id., see p. 139.

"The United States cannot any more than a State interfere with private rights except for legitimate governmental purposes."

WAITE, C. J., *in the Sinking Fund cases, 99 U. S., 718.*

In Wilkinson vs. Leland this Court conceded that the Legislature could not destroy a vested right of property; but held, that the right of an heir or devisee to land was subject to the payment of the debts of the ancestor or testator, and that *for this reason* it

was competent for the Legislature to validate a void sale made by a foreign executrix.

2 Peters, 657.

In another case it was held that where under a State statute a pilot offers his services, and they are refused, and thereupon he becomes entitled to half compensation, a subsequent repeal of the statute cannot deprive him of this vested right.

It was considered that his claim was *analagous* to one resting upon *implied contract*.

Steamship Co. vs. Joliffe, 2 Wall., 457–8.

Similar views as to the extent of legislative power over vested rights were expressed in a case in this Court, though the decision was placed upon the express constitutional provision against impairing the obligation of contracts.

Memphis vs. U. S., 97 U. S., 295–6.

Turning now to the State Courts, we find the same doctrine laid down.

A statute cannot validate the deed of a married woman, who has undertaken to convey a greater estate than she took under a will.

Shonk vs. Brown, 61 Penn. St., 327.

A statute cannot, after a man's death, remedy the mistake he made in signing the wrong paper for his will.

Alter's Appeal, 67 Penn. St., 344.

A title once vested in one person cannot be destroyed by a subsequent statute, removing disabilities of alienage, but for which the land would have descended to some one else.

Luhrs vs. Eimer, 80 N. Y., see p. 180.

A statute cannot declare a tax deed to be valid,

which by law was *void*, at the time of the passage of the act.

Orton vs. Noonan, 23 Wisc., 104.

The same ruling has been made in New York.

Hopkins vs. Mason, 61 Barb., see p. 474.

And in Kansas.

Taylor vs. Miles, 5 Kans., 511.

These cases are exactly parallel with the case at bar, and in no way conflict with a well-known line of cases, curing previous irregularities, that consisted in the omission of mere matters of form, with which the Legislature could originally have dispensed.

So it has been held that the Legislature cannot validate a judgment which before was absolutely void.

Nelson vs. Rountree, 23 Wisc., 370.

Where the rights of an intermediate purchaser are concerned, a statute cannot validate a conveyance, which by reason of a defective acknowledgment never was "duly" recorded, so as to operate as constructive notice.

Brinton vs. Seevers, 12 Withrow (Iowa), 393.

Thompson vs. Morgan, 6 Minn., 296.

These decisions do not oppose those others which permit such defects to be remedied, when only the parties to the conveyance are concerned. In one case vested rights are not affected; in the other they are. The distinction taken precisely accords with our present proposition.

The Legislature cannot authorize the imposition of a municipal tax upon land outside of the municipal limits.

Wells vs. Weston, 22 Mo., 385.

Where a statute gave to laborers a right to bring actions against the railroad company as well as against their immediate contractor, a repeal cannot destroy a right of action already vested.

Streubel vs. Milwaukee, &c., R. R. Co., 12 Wisc., 74.

B.

Before the act in question was passed, repeated decisions of this Court had declared the various State statutes for the collection of head moneys to be null and void. Of necessity the acts of all officials under them were also null and void. Can Congress step in and decree them *to have been* valid? To pronounce upon the validity of past transactions and acts is to exercise judicial power. For Congress to exercise judicial power is not only to exceed its own functions but to invade those of another and a co-ordinate branch of the Government.

An Act of Congress declaring the effect of pardons to be something different from that previously declared by this Court, invades the powers of both the judicial and executive departments, and is void.

U. S. vs. Klein, 13 Wall., 128.

Insolvent proceedings having once been adjudged void, a subsequent statute declaring them valid is an invasion of judicial powers.

Denny vs. Mattoon, 2 Allen, 379.

The Court declared a certain assessment to be void, and enjoined collection. *Held*, that a subsequent statute declaring it valid and authorizing collection was itself void.

Mayor vs. Horn, 26 Md., 206.
People vs. Lynch, 51 Cal., 15.

A statute allowing deductions from a term of imprisonment to operate on previous sentences is unconstitutional, as trenching upon judicial functions.

State vs. Halloway, 42 Penn. St., 446.

XIII.

For the reasons assigned, the judgment of the Circuit Court should be reversed.

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NEW YORK LEGISLATION.

LAWS OF 1847, CH. 431, § 2;:

"§2. It shall be the duty of the officer to whom such report shall be made, by an endorsement to be made on the said report, to require the master or commander of such ship or vessel to pay to the treasurer of said village or city, or to the overseer of poor, as the case may be, the sum of *one dollar* for every person or passenger reported by such master or commander as aforesaid, which sum shall be paid as aforesaid, within twenty-four hours after the arrival of such ship or vessel at the said port or landing.

LAWS OF 1851, CH. 523, § 7:

"§ 7. Section second of chapter three hundred and fifty of the laws of eighteen hundred and forty-nine, is hereby amended so as to read as follows: It shall be the duty of the said Mayor or other person discharging the duties of his office aforesaid, by an endorsement to be made on the said report, to require the owner or consignee of the ship or vessel from which such persons were landed, to give a several bond to the people of the State, in a penalty of three hundred dollars for each and every person or passenger included in such report, such bond being secured as hereinafter provided, and conditioned to indemnify and save harmless the commissioners of emigration and each and every city, town or county in this State from any cost which said commissioners or such city, town or county shall incur for the relief or support of the person named in the bond, within five years from the date of such bond, and also to indemnify and refund to the said commissioners of emigration, any expense or charge they may necessarily incur for the support or medical care of the persons named therein, if received into the marine hospital or any other institution under their charge.

"Each and every bond shall be secured by two or more sufficient securities, being residents of the State of New York, each of whom shall prove by oath or otherwise that he is owner of a freehold in the State of the value of three hundred dollars over and above all or any claim or lien thereon, or against him, including therein any contingent claim which may accrue from or upon any former bond given under the provisions of this act, or such bond may, at the option of the party, be secured by mortgage of real estate, or by the pledge and transfer of public stock of the United States, or of the State of New York, or of the City of New York, or by deposit of the amount of penalty in some bank or trust company; such security, real or personal, having been first approved by the said Mayor.

"It shall be lawful for any owner or consignee, at any time within [twenty-four hours] after the landing of such persons or passengers from any ship or vessel in the port of New York [except as in the section hereinafter provided], to commute for the bond or bonds so

required, by paying to the Health Commissioners of the City of New York the sum of *one dollar and fifty cents* for each and every passenger reported by him as by law required; the receipt of such sum by said Health Commissioners shall be deemed a full and sufficient discharge from the requirements of giving bonds as above provided.

"The said Health Commissioner is hereby required to pay over daily the said money with an account thereof to the Chamberlain of the City of New York. But no owner or consignee shall be authorized to commute for the bond so required for any passenger arriving in the port of New York, between the first day of December and the fifteenth day of April, who may be sent to the Marine Hospital from shipboard by the health officer, or by the authority of the Board of Health of the City of New York, on account of illness from ship fever.

"*The Commissioners of Emigration shall have authority to commute specially for any bond in such cases at such rates and in such manner as shall appear to them equitable and proper.*

"It shall be the duty of the health officer to report, without delay, to the Commissioners of Emigration the names of all passengers sent by his order, during the above-mentioned period, from shipboard to the Marine Hospital on account of illness from ship fever.

"For the duties performed by the Health Commissioner and named in this section, he shall be paid by the Commissioners of Emigration at the rate of seventeen hundred and fifty dollars per annum, and he shall be paid the remainder of his salary by the Mayor, Aldermen and Commonalty of the City of New York. And at and after the expiration of the term of the present Health Commissioner, it shall be lawful for the Commissioners of Emigration to select for the performance of the duties named in this section, and now performed by the Commissioner of Health, either the Mayor of the City of New York, or the Chamberlain of said city, or the Health Commissioner, and the compensation for the performance of said duties shall be so much as such officer so selected and the Commissioners of Emigration may agree upon, and thereafter the salary of the Health Commissioner shall be fixed by the Mayor, Aldermen and Commonalty of the City of New York, and paid from the treasury of said city."

LAWS OF 1853, CH. 224, § 13:

"§ 13. The amount for which the master, owner or owners, consignee or consignees of any such ship or vessel may commute for any bond or bonds, authorized or required by or pursuant to the seventh section of chapter five hundred and twenty-three of the Laws of eighteen hundred and fifty-one, shall, from and after the passage of this act, be *two dollars* for each and every such passenger, instead of one dollar and fifty cents as now provided by law; and

fifty cents of the amount commuted for any passenger or passengers shall be set aside as a separate fund for the benefit of each and every county in this State, except the County of New York.

"The Commissioners of Emigration shall deposit the moneys of said fund so set apart in any bank that the said Commissioners may select, and the same, or as much of it as may be necessary, shall be distributed to the several counties, except the County of New York, once in every three months, and the balance that may be left after such three months payment shall be paid over to the Commissioners of Emigration for general purposes."

LAWS OF 1871, CH. 475, § 1:

"Section 1. Section thirteen of the act entitled, 'An Act to amend the several acts relating to the powers of the Commissioners of Emigration, and for the regulation of the Marine Hospital,' passed April thirteenth, eighteen hundred and fifty-three, is hereby amended so as to read as follows:

"§ 13. The amount for which the master, owner or owners, consignee or consignees of any such ship or vessel bringing emigrants or passengers to the City of New York, may commute for any bond or bonds authorized or required by or pursuant to the seventh section of chapter five hundred and twenty-three of the laws of eighthteen hundred and fifty-one, shall, from and after the passage of this act, be *one dollar and fifty cents* for each and every such passenger."

MASSACHUSETTS LEGISLATION.

ACT OF APRIL 20, 1837, §§ 1, 2 and 3:

"Sec. 1st. When any vessel shall arrive at any port or harbor within this State, from any port or place without the same, with alien passengers on board, the officer or officers, whom the mayor and aldermen of the city, or the selectmen of the town, where it is proposed to land such passengers are hereby authorized and required to appoint, shall go on board such vessels and examine into the condition of said passengers.

"Sec. 2d. If, on such examination, there shall be found among said passengers any lunatic, idiot, maimed, aged or infirm person, incompetent, in the opinion of the officer so examining, to maintain themselves, or who have been paupers in any other country, no such alien passenger shall be permitted to land until the master, owner, consignee or agent of such vessel shall have given to such city or town a bond in the sum of one thousand dollars, with good and sufficient security, that no such lunatic or indigent passenger shall become a city, town or state charge within ten years from the date of said bond.

"Sec. 3d. No alien passenger, other than those spoken of in the preceding section, shall be permitted to land until the master, owner, consignee or agent of such vessel shall pay to the regularly appointed

boarding officer the sum of *two dollars* for each passenger so landing; and the money so collected shall be paid into the treasury of the city or town, to be appropriated as the city or town may direct for the support of foreign paupers."

LAWS OF 1848, CHAP. 313, § 5:

"SEC. 5. If, on examination, there shall be found, among said passengers, any lunatic, idiot, maimed, aged, or infirm person, incompetent, in the opinion of the superintendent so examining, to maintain themselves, or who have been paupers in any other country, no such alien passengers shall be permitted to land until the master, owner, consignee, or agent of such vessel shall make and deliver to said superintendent, a bond to the Commonwealth, with such sureties as are undoubted and satisfactory, in the sum of one thousand dollars, that no such lunatic or indigent passenger shall ever become a city, town, or state charge, from the date of said bond; *provided, however*, that if it shall be made to appear to said superintendent, by undoubted evidence, that any passengers on board of such vessel are in such condition as to health, property, capacity, and character, that they are not likely to become chargeable to any city or town, he may permit them to be landed, on payment to him, by said master, consignee, or agent, of the sum of *two dollars* for each passenger so landed; and the names of all such passengers shall be certified by said superintendent on the back of the report; *and provided, further*, that if any such passengers are so sick or destitute as to require relief, and if said master shall refuse to report them, or if said master, owner, consignee, or agent shall refuse to give such bond as is herein required, the said superintendent may permit them to be landed, and, in such cases, any city or town, that shall be put to any expenses for the support, sickness or burial of any such passenger, within ten years of the time he has so landed, may maintain an action of debt against said master, owner, consignee, or agent, and recover all expense incurred as aforesaid; and said commanding officer, owner, consignee, or agent, shall be liable to the penalties provided in the tenth section of this act."

LAWS OF 1850, CHAP. 105, § 1:

"SECTION 1. Any master, owner, consignee, or agent, of any vessel, or any passenger carrier by water, who shall bring, or aid in bringing into this Commonwealth any alien never before within the state, shall, for each and every such alien, give a bond to the Commonwealth with good and sufficient sureties, to be approved by the superintendent of alien passengers, in the penalty of one thousand dollars, with a condition that no such alien shall ever become a city, town, or state charge as a pauper, and in default of giving such bond, shall forfeit and pay to the use of the Commonwealth the sum of one thousand dollars, for every such alien so brought into the state, to be recovered by action of debt, in any court competent to

try the same; *provided*, that it shall be at the option of every such master, owner, consignee, or agent of any vessel, or passenger carrier by water, to pay to the superintendent of alien passengers, for the use of the Commonwealth, in place of such bond, the sum of *two dollars* for every such alien, who is not, in the opinion of the Superintendent, a pauper, lunatic, or idiot, or maimed, aged, infirm or destitute, or incompetent to take care of himself or herself, without becoming a public charge as a pauper; *and provided, also*, that this act shall not extend to seamen sent from foreign ports by Consuls or Vice-Consuls of the United States, nor to Ambassadors, Consuls, or public ministers, or other persons representing foreign states, nor to persons coming on shore from vessels in distress, nor to any alien passenger taken from any wreck where life is in danger."

LAWS OF 1852, CHAP. 279, § 1:

"SEC. 1. The fifth section of the act entitled An Act concerning Alien passengers, approved on the tenth day of May in the year one thousand eight hundred and forty-eight, is hereby amended so as to read as follows: If on examination there shall be found among said passengers any lunatic, idiotic, deaf and dumb, blind or maimed person, no such person shall be permitted to land until the master, owner, consignee, or agent of such vessel shall make and deliver to said superintendent a bond to the Commonwealth, with satisfactory sureties, in the sum of one thousand dollars, conditioned that such passenger shall not, within ten years from the date of said bond, become a city, town or State charge within the Commonwealth. And in respect to every other of said passengers the said superintendent, before he shall be permitted to land, shall require a bond, secured as aforesaid, in the sum of three hundred dollars, conditioned that such person shall not become a charge, as aforesaid, within five years from the date of said bond: *provided, however*, that in lieu of the bond lastly above-mentioned, the said superintendent may receive from said master, owner, consignee or agent, *such sum as in his judgment shall be sufficient to cover the risk incurred by the Commonwealth in permitting such passenger to be landed*, and thereupon permit such passenger to be landed, *provided*, that the sum so to be paid shall in no case be less than two dollars; and the names of all such passengers shall be certified by said superintendent on the back of the report: *and provided further*, that if any passengers so arriving as aforesaid are so sick or destitute as to require relief, and if said master shall refuse to report them, or if said master, owner, consignee or agent, shall refuse to give such bond, as is herein required, the said superintendent may permit them to be landed, and in such cases any city or town that shall be put to any expense for the support, sickness or burial of any such passenger, within ten years of the time he has so landed, may maintain an action of debt against said master, owner, consignee or agent, and recover all expenses incurred as aforesaid; and said commanding officer, owner, consignee or agent,

shall be liable to the penalties provided in the tenth section of this act."

LAWS OF 1853, CHAP. 366, § 1:

"SEC. 1. The Commissioners on aliens and State paupers, appointed under the Act of one thousand eight hundred and fifty-one, Chapter three hundred and forty-two, *are hereby authorized and empowered to commute the bonds taken by superintendents of alien passengers in this Commonwealth, in accordance with the provisions of the Act of thousand eight hundred and forty eight, Chapter three hundred and thirteen, upon such terms as in their judgment may promote the interest of the Commonwealth.*"

CALIFORNIA LEGISLATION.

"*The commissioner may compound or commute for any of the penalties or fines upon such terms as he thinks proper*, and at the end of every month report to the Controller of State the reasons and causes of such compounding or commutation.

He may also compound or commute with the owner or consignee of any vessel for any bond required to be given by such owner or consignee for such passengers as have been paupers in any other country, or who from their condition at the time of their arrival in this State, or from sickness or disease at the time of their leaving the port of departure, are a public charge, or likely soon to become so; *such commutation to be fixed by the Commissioner at such sum as he may deem sufficient* to defray the necessary expenses of such persons during the continuance of their then sick, disabled or infirm state." Hittell's Codes and Statutes of California, § 2960.

LOUISIANA LEGISLATION.

"It shall be the duty of the said Commissioners of Immigration or their appointed agent, by an endorsement to be made on said report, to require the owner or consignee of the ship or vessel from which such persons were landed to give a several bond to the people of the State, in a penalty of three hundred dollars, for each and every person or passenger included in said report, such bond being secured, as hereinafter provided and conditioned to indemnify and save harmless the Commissioners of Immigration and each and every city, town or parish in this State from any costs which said Commissioners or such city, town or parish shall incur for the relief or support of the person named in the bond, within five years from the date of such bonds, and also to indemnify and refund to the said Commissioners of Immigration any expense or charge they may necessarily incur for the support or medical care of the persons named therein.

"Each and every bond shall be secured by two or more sufficient securities, being residents of the State of Louisiana, each of whom

shall prove by oath or otherwise that he is owner of a freehold in the State of the value of three hundred dollars, over and above all and any claim or lien thereon or against him, including therein any contingent claim which may accrue from or upon any former bond given under the provisions of this act; or such bond may, at the option of the party, be secured by mortgage of real estate or by pledge and transfer of public stock of the United States, or of the State of Louisiana, or of the City of New Orleans, or by deposit of the amount of penalty in some bank or trust company, such security, real or personal, having been first approved by the said Commissioners of Immigration.

"It shall be lawful for any owner or consignee at any time within twenty-four hours after the landing of such persons or passengers from any ship or vessel in the port of New Orleans, except as in the section herein provided, to commute for the bond or bonds so required, by paying to the Commissioners of Immigration or their appointed agent the sum of *two dollars* for each and every passenger reported by him, as by law required, the receipt of such sum by said Commissioner or agent shall be deemed a full and sufficient discharge from the requirements of giving bonds, as above provided, but no owner or consignee shall be authorized to commute for the bond so required for any passenger arriving in the port of New Orleans who may be sent to any hospital from shipboard by the health officer, or by the authority of the Board of Health of the City of New Orleans, on account of illness from ship fever, cholera or yellow fever.

"*The Commissioners of Immigration shall have authority to commute specially for any bond in such cases, at such rates and in such manner as shall appear to them equitable and proper.*

"It shall be the duty of the Health Officer to report, without delay, to the Commissioners of Immigration the names of all passengers sent by his order during the above mentioned period to any hospital no account of illness from ship fever, cholera or yellow fever."

113-33

SUPREME COURT OF THE UNITED STATES.

THE LIVERPOOL, NEW YORK AND PHILADELPHIA STEAMSHIP COMPANY,

Plaintiff in Error,

against

BAR ASSOCIATION

THE COMMISSIONERS OF EMIGRATION,

Defendants in Error.

POINTS FOR DEFENDANTS IN ERROR

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SUPREME COURT OF THE UNITED STATES.

THE LIVERPOOL, NEW YORK AND PHILADELPHIA STEAMSHIP COMPANY,
Plaintiff in Error,

AGAINST

THE COMMISSIONERS OF EMIGRATION,
Defendant in Error.

Statement for Defendant in Error.

The plaintiff in error paid one million and ninety-three thousand dollars to the Chamberlain of the City of New York commutation head-moneys, and seeks to recover those moneys in an action in assumpsit against the defendant, an agent of the State of New York for the mere *disbursing* of those moneys pursuant to certain laws of the State of New York regulating immigration.

The action is laid in assumpsit for money had and received to the plaintiff's use, on the theory that the law implies a promise to repay money paid in commutation for a bond required to be given by a void law, without duress of person or goods.

SYNOPSIS OF THE LAWS.

By the statutes of the State of New York, the master of every vessel arriving at the port of New York from a foreign port is required, within twenty-four hours after his arrival, to report in writing to the Mayor of New York, the name, birth-

place, last residence, and occupation of every passenger who is not a citizen of the United States; the statute then directs the Mayor, by endorsement on this report, to require the owner or consignee of the vessel to give a bond for every passenger so reported, in a penalty of $300, with two sureties, each to be a resident and freeholder of the State, conditioned to indemnify the Commissioners of Emigration, and every county, city and town in the State, against any expense for the relief or support of the person named in the bond for four years thereafter; but that the owner or consignee may commute such bond and be relieved from giving it, by paying to the Chamberlain of the City of New York, (as provided by the Act of 1847,) for each passenger, within twenty-four hours after his or her landing, the sum of one dollar and fifty cents, fifty cents whereof is to be paid to other counties in the State to indemnify and save harmless the several towns, cities and counties from the support of such immigrants, and the residue to be drawn out on the warrant of the Commissioners of Emigration, on appproriation, for the maintenance and support of persons for whom such commutation money shall have been paid, who shall have become a public charge, to aid in removing persons from one part of the State to another and assist them to procure employment, and to be used in erecting wharves and buildings, and in paying salaries and clerk hire.

If the master, agent, consignee or owner does not, within twenty-four hours after landing such passengers, either give the bond or pay the commutation tax for each passenger, he is liable to a penalty of $500 for every such passenger, which was by a void law attempted to be made a lien on the vessel, to be enforced at the suit of the Commissioners of Emigration.

By the Act of 1849, the commutation head-moneys were required to be paid to the Health Commissioner, and by him paid over daily to the City Chamberlain. By the Act of 1851, the defendant was empowered to designate either the Health Commissioner or the Mayor of New York City, or the City Chamberlain to discharge the duties of the Health Commissioner. To avoid circumlocution the Chamberlain, was designated as the person to discharge the duties of Health Commisioner, *i. e.*, of receiving the moneys and paying them over daily to the City Chamberlain. The Chamberlain's functions as depositary designated by law as agent of the State were unchanged.

In 1875, this Court held in the *Henderson Case* that *these commutation headmoneys* were in effect and law identical with the old headmoneys declared unconstitutional in the *Passenger Cases*, and that the plaintiffs were entitled to an injunction restraining their collection. On the basis of this decision the plaintiffs brought this suit to recover said moneys in February, 1877 (fol. 8). Thereupon Congress passed an act June 19th, 1878, validating the collection of all such headmoneys, applying generally to all the States, and forbidding the Courts under its jurisdiction from *maintaining* any suits for the recovery thereof. The State laws will be found *in extenso* in the appendix hereto.

POINTS.

The defendant maintains:

1st. That the money was paid voluntarily.

2d. That there was no privity between plaintiff and defendant, and no duty from which the law will raise up a promise of repayment.

3d. That the Act of Congress of June 19th, 1878, confirming the acts of defendant in collecting "head-moneys," prior to January, 1877, validated the defendant's acts and removed the objection to their validity which was the sole ground of plaintiff's claim.

4th. The Circuit Court had no jurisdiction of the action.

All four of these Points Raised.

The plaintiff starts with the illusive proposition that its right of action is not in issue at all, but only the Act of Congress, indeed only that clause of said act declaring that "no action shall be *maintained*." But,

1st. Plaintiff at once and inevitably confutes its own proposition by basing its argument on the necessary theory that the act cuts off its *right of action*, and is *therefore unconstitutional*. Manifestly to sustain this it must show that it has or alleges a *right of action*. Otherwise it has none to cut off.

2d. So, again, plaintiff contends that the act violates the obligation of contract, under which it must show that defendant was under implied contract to repay the money.

3d. Plaintiff contends again that the act, by cutting off its action, deprives it of its "property and valid *rights of action*" and "violates the constitutional guaranty of due process of law" (Plaintiff's Point XI., B). Now, to sustain this, it must show said "*valid rights of action.*" In fine, plaintiff's last points entirely dispose of his first points.

4th. In any view, the act validating the collection of the head-moneys was as held, "*a bar to any recovery*" (fol. 23), and necessarily brings up the question whether Congress had the power to validate. If so, plaintiff cannot possibly have any right of action to recover.

5th. If there be no recovery possible under the public statutes of the State and the United States, which do not require to be pleaded, then it would be setting those statutes at nought to remit the case for trial. No proof and no judgment of the Court below can overturn these statutes.

I. THERE IS NO PRIVITY BETWEEN THE PARTIES TO THIS SUIT, NOR DUTY WHICH WILL RAISE UP A PROMISE OF REPAYMENT BY DEFENDANT.

An endorsement by the Mayor of New York upon the master's report, was the only requisition in the law upon which plaintiff paid its money to the Chamberlain of the City of New York. The money so paid to the Chamberlain was to be drawn out on a warrant by the Commissioners of Emigration, to provide for the maintainance and support of persons for whom commutation-money had been paid or bonds given, who would otherwise have become a public charge upon any city, town, or county of this State.

The question thus presented is, does the law imply a promise of repayment from defendant of moneys disbursed by defendant, a corporation with limited and defined powers, pursuant to law?

The answer is, No! First, because there is no privity. Second, because there is no duty; and third, because the law, having imposed a paramount duty upon defendant, directing how the

money should be expended, will not imply an inconsistent and double duty, by raising up a promise to repay plaintiff, thus creating a double liability—one to the State, the other to the plaintiff.

In Cary vs. Curtis, 3 How., 236, this Court held that the effect of § 2, C. 82, U. S. Laws 1839, was to deprive the importer of his common law remedy against the collector to recover illegal duties paid under protest, because it required the collector, notwithstanding the protest, to place the money to the credit of the Treasurer of the United States.

"This section of the act of Congress * * * must be "understood as leaving with the Collector, no lien upon or dis- "cretion over the sums received by him on account of the duties "described therein; but as converting him into the mere bearer "of those sums to the treasury of the United States, through the "presiding officer of which department they were to be disposed "of in conformity with the law."

It was urged that the deposit was directed to be made in the treasury simply to await the decision of the suit against the collector, to this the Court say, we "cannot assent to this construction."

"'The action of *assumpsit* for money had and received, it "'is said by Lord Mansfield, Burr, 1012, *Moses vs. Macfarlane*, "'will lie in general whenever the defendant has received "'money which is the property of the plaintiff, and which the "'defendant is obliged by the ties of natural justice and equity "'to refund.' And by Butler, Justice, in Stratton vs. Rastell, "2 T. R., 370. 'That this action has been extended on the "'principle of its being considered like a bill in equity. And, "'therefore, in order to recover money in this form of action, "'the party must show that he has equity and conscience on "'his side, and could recover in a court of equity.' These are "the general grounds of the action as given from high author- "ity. There must be room for implication as between the par- "ties to the action, and the recovery must be *ex æquo et bono* or "it can never be." * * * "The absence of notice will be an "exculpation of the agent in every instance. And with regard "to the effect of the notice in fixing the liability upon the agent, "that effect is dependent upon the known powers of the agent "and the character of this agency. * * * The case from 4 "T. R. (Greenaway vs. Hurd, p. 553) has this common feature

" with that before us, that it was an action against an excise " officer for duties said to have been illegally collected, in which " the plaintiff denied the legality of the demand, though he sub- " sequently paid it. But all three of these cases concur in con- " demning the harshness of a rule which would subject an agent, " who is a mere channel of conveyance or delivery of the " amount which would pass through his hands. Neither of these " cases was effected by a positive statutory mandate requiring the " agent to make payment over to the principal.

" Another principle held to be fundamental to this action is " this: that there must exist a privity between the plaintiff and " defendant; something on which an obligation, an engage- " ment, a promise from the latter to the former can be implied; " for if such implication be excluded from the relation between " the parties by positive law, or by inevitable legal intendment, " every foundation for the promise and of the action upon it is " destroyed; for none may be presumed to promise, what either " law or reason does not warrant or may actually forbid."

Ibid., page 248.

Except for the purpose designated in the statute the defendant had no control over, or power of disposing of the money. The money belonged to the State. In *disbursing* the money pursuant to law defendant did not become the owner, nor custodian of the money, nor come into privity with the plaintiff. The Chamberlain, to whom plaintiff paid the money, was the agent of the State, and defendant also agent of the State. The State alone was liable.

Stevens vs. Badcock, 3 Barn and Adolph, 354, and cases cited in Cary vs. Curtis, *supra*, pp. 248-9.

" But the law never implies a promise to pay, unless duty " creates the obligation to pay; and, moreover, it never implies " a promise to do an act contrary to duty or contrary to law." * * * " And the question here is, will the law imply a prom- " ise from the collector to do that which is contrary to his " official duty, contrary to the command of the positive statute? " If it will not, then the action of *assumpsit* will not lie in this " case."

" Moreover, the law will never imply a promise where it " would be unjust to the party to whom it would be imputed,

" and contrary to equity, so to imply it. Suppose the collector " should not, as directed by law, pay the money into the Treas- " ury, the United States might undoubtedly maintain an action " against him for money had and received to their use.

" Because it being his duty to do so, the law would imply a " promise to pay it. Can the law at the same time imply a prom- " ise to pay it elsewhere or to another, and thus burden the " collector with the double obligation of paying to the Govern- " ment and also to one claiming in adversary interests."

Ibid. 251.

As between the State and the defendant the money belonged to the State, to the State the defendant owed its whole duty. By paying over the money to the plaintiff it would have violated its duty, and the commissioners would have rendered themselves personally liable to the State for such act. The law cannot imply a promise to violate the law.

II. The payment was voluntary.

The plaintiff, under the New York Statute, could pursue any one of three courses—1st, it could give the bond required by law and then, in a suit upon it, contest its validity; or, 2d, it could elect to pay the commutation money in lieu of the bond, and be without remedy; or, 3d, it could refuse either to give the bond or to pay the commutation headmoney and defend itself against the penalties and forfeitures of the statute. But it could not *elect* to pay the commutation moneys in lieu of giving a bond and at the same time insist that it had by a refusal to pay or give the bond incurred a penalty or forfeiture which amounted to duress of property. Had plaintiff first incurred the penalty by refusing to give a bond or commute, and then upon seizure of its ships paid the money to secure their release, it might, had the seizure been unlawful, have had a good claim against the State —or possibly against the officer making the seizure, but not against the defendant.

The plaintiff chose to avoid this question by paying. An election once made is determined forever.

Morris vs. Rexford, 18 N. Y., 552.

The Courts were open to plaintiff either to defend an action at law for the debt, as was successfully done in the case of the People of New York vs. Compagnie Generale, 107 U. S., 59, or, by applying to a court of equity, restrain the collection of the tax, as was done in Henderson vs. The Mayor, 92 U. S., 259.

The facts plaintiff alleges are that defendant was indebted to plaintiff "in a plea of assumpsit upon an implied promise * * * for certain commutation moneys from the plaintiff unlawfully demanded, exacted and required and received at the City of New York by the said defendant, under color of certain laws in the State of New York concerning passengers in vessels coming to the State of New York, and concerning the powers and duties of Commissioners of Emigration and for the regulation of marine hospitals, and paid by said plaintiff under the inducement of certain representations of the defendant, this plaintiff being an alien and not knowing the laws of the State of New York, and under protest at various times" (p. 3).

To render a payment involuntary there must be duress of person or property in some form or other, by which either personal liberty or the possession of, or the ownership of or the dominion over property, is imperilled. Money voluntarily paid can only be recovered in case of fraud or mutual mistake of fact. Mere ignorance of the law of the place of payment will not avail.

In Railroad Co. vs. Commissioners, 98 U. S., 542, the warrants to collect taxes were issued. They "authorized the "treasurer (of the county), if default should be made in pay- "ment of any of the taxes charged upon the lists, to seize and "sell the personal property of the persons making the default "to enforce the collection." * * * "The company had per- "sonal property in the county which might have been seized, "but no attempt had been made to seize it, and no other notice "but such as the law implies had been given that payment "would be enforced in that way." Held that such taxes, though paid under protest and though the taxes were void, could not be recovered back.

S. P. Lamborn vs. County Commissioners, 97 U. S., 181.

The same questions involved in this case were decided adversely to the plaintiff in error in *Oceanic Steam Nav. Co. vs. Tappan*, 16 Blatch., 296.

WALLACE, J., after quoting from the opinion in *Railroad Co. vs. Commissioners* (*supra*), says:

"This, as we understand it, is a correct statement of the com-
"mon law. There are, no doubt, cases to be found in which the
"language of the Court, if separated from the facts of the par-
"ticular case under consideration, would seem to imply that a
"protest alone was sufficient to show that the payment was not
"voluntary; but on examination it will be found that the pro-
"test was used to give effect to the other attending circum-
"stances."

Judgment for defendant.

For other cases upon voluntary payments, see appendix.

The provision in the Act of 1847 for a lien upon the vessels in case of failure to give a bond or to commute, to be enforced by a summary attachment, pursuant to title eight, chapter eight, part III., of the New York Revised Statutes, superseded by the Act of 1862, similar in its provision to the R. S., could not be put in operation until a forfeiture had been incurred. As long as plaintiff commuted there was no forfeiture and no lien and there could be no attempt to attach the vessel. Mere apprehension is insufficient. But if it were, it must be an apprehension of enforceable process. There was none. The act requiring a bond or commutation was, so far, unconstitutional.

Henderson vs. Mayor, *supra*.

But the act to enforce the lien by attachment was also unconstitutional.

Matter of the Josephine, 39 N. Y., 19 (1868).
Brookham vs. Hammill, 43 N. Y. (1871).
Shephard vs. State, 43 N. Y., 52.
The Moses Taylor, 4 Wallace, 44.
The Hive vs. Trevor, 4 Wallace, 555–568.

The plaintiff must be conclusively presumed to know the law. The apprehension of void process, to enforce a void lien under a void statute, is too ephemeral and unsubstantial to affect the will. To sustain such a claim would be to abolish the principle which marks the distinction between voluntary and involuntary payments. The distinction itself is incapable of destruction.

III. "The acts of every State and municipal officer or corporation in the collection of head moneys shall be valid."

U. S. Laws, Vol. 29, p. 177.

That Congress had power to pass acts similar to the State head moneys acts is settled law.

People vs. Compagnie General Transatlantique, *supra*, p. 63.

Henderson vs. Mayor *supra*.

It is equally well settled that Congress may adopt State laws.

STATE LAWS ADOPTED BY CONGRESS.

By Chap. XII., 1st United States Statutes at Large, page 619, Congress directed certain officers to observe the Quarantine and Health laws of the several States, and to aid in their execution.

By Chap. V., 1st United States Statutes at Large, p. 106, State inspection laws are directed to be enforced, and clearance of vessels, without a compliance therewith, prohibited.

By Chap. X., 2d United Statutes at Large, p. 205, State Laws prohibiting importation of *colored persons* are enforced.

It is plain that the State laws prohibiting the importation of colored persons were void until ratified by Congress.

Chy Lung vs. Freeman, 2 Otto, 275.

In *ex parte* Siebold, 100 U. S., 372-388, a question arose as to the construction of the State and Federal laws, relating to the election of the Representatives of the United States members of Congress.

The States were granted by the Constitution of the United States, Subdivision 1, Section 4, Article 1, power to regulate their elections, subject to the power of Congress "at any time "by law, to *make* or alter such regulations." The Court say at page 388: "The objection that the laws and regulations, the "violation of which is made punishable by the Acts of Con- "gress, are State laws, and have not been adopted by Congress, "is no sufficient answer to the power of Congress to impose "punishment. It is true that Congress has not deemed it neces- "sary to interfere with the duties of the ordinary officers of "election, but has been content to leave them as prescribed by "State laws.

"The State laws which Congress sees no occasion to alter but "which it allows to stand, are in effect adopted by Congress."

IV. THE MONEYS SUED FOR BELONGED TO THE UNITED STATES.

The headmoneys laid by the State law, in usurpation of congressional power, belonged to the United States, and this is true whether it be laid upon the immigrant or his carrier.

Congress and the States have concurrent jurisdiction over the regulations of commerce, not national in their nature, or which do not require a uniform rule. As to these latter regulations non-action by Congress is an inhibition on State action.

What is the effect of confirmatory congressional action upon such prior State action? The State law was pronounced invalid as prohibited by Federal non-action. From this it would logically follow that the power which can inhibit, can grant and confirm; otherwise there must be a limit to the congressional action, which has been pronounced supreme.

" The Congress shall have power:

3. To regulate commerce with foreign nations." Article I., Section 8.

The head-money tax has been declared to be a regulation of commerce, national in character. It is then within the unlimited regulating power of Congress. What matters it, whether under act of Congress the State collects and expends the money, or the United States collects and the States expend the money, or the United States collect and the States' agents expend the money?

The validating act was not a *delegation* of Congressional discretion. It was *the exercise of that very discretion by Congress* upon the *past* acts of the States, being expressly limited to headmoneys already collected.

The defendant does, under the Act of Congress, " to regulate immigration," of August 3d, 1882, c. 376, precisely what it did under the State law.

In the exercise of its concurrent powers over commerce the State encroached upon those of Congress. So far as those powers were exercised (executed), they are beyond the enquiry of any

power but Congress, and Congress has ratified and confirmed those acts.

Congress could demand the money, collected by the State under usurpation of the sovereign power of Congress, and such demand could not be defeated by pleading that the money had been paid by plaintiff under protest, or under void State law. Congress could not only demand the money, but could appropriate it or confirm its appropriation by the State.

Langford vs. U. S., 101 U. S., 346.

In the case of The National Bank vs. County of Yankton, 101 U. S., 133, in reviewing the effect of an act of Congress upon an act of the Legislature of the territory of Dakota, the Supreme Court say: "Congress may not only abrogate laws of "the territorial Legislatures, but may itself directly legislate for "the local government. It may make a void act of the Legis- "lature valid, and a valid one void."

And Congress so acted in repealing a part of an act of the Dakota Legislature, and legalizing what had already been done under it.

In Nelson vs. The Mayor, 63 N. Y., 345, it was held that, "it was clearly within the power of the Legislature sub- "sequently to validate the contract by providing for the pay- "ment of the expense incurred under an illegal contract."

THE POWER WHICH CAN GRANT, CAN DISPENSE WITH THE NECESSITY of the grant.

State vs. Town of Union, 33 N. J., 356.
Trustees vs. McCaughy, 2 Ohio St., R. N. S., 155.

"The right to *limit involves the* POWER TO DISPENSE with "*limitations.*"

Brown vs. Mayor, 63 N. Y., 244.
State vs. Norwood, 12 Md., 195.
Blunt vs. Jacksonville, 81 Wis., 658.

In the matter of Sackett, &c., streets, 74 N. Y., 106, the Court of Appeals say:

"The Legislature can adopt and sanction an improvement "or an expenditure which it could previously authorize. It "may authorize an assessment for an improvement either be- "fore or after an improvement is made, as in its judgment is "deemed best."

The Legislature of Pennsylvania passed an act curing the defective acknowledgement of certain deeds executed by married women held, a lawful act.

Watson vs. Mercer, 8 Pet., 108.

V. PLAINTIFF CANNOT CALL IN QUESTION THE ACTS OF THE STATE OR THE DEFENDANTS SO FAR AS THEY HAVE BEEN EXECUTED.

Chap. 127, passed June 19, 1878, U. S. Laws, Vol. XX., p. 177.

"An act to legalize the collection of head-moneys already "paid."

"*Be it enacted by the Senate and House of Representatives "of the United States of America, in Congress assembled*, That "the acts of every State and municipal officer or corporation "of theseveral States of the United States in the collection "of head-moneys prior to the first day of January, eighteen "hundred and seventy-seven, from the master, consignee or "owner of any vessel bringing passengers to the United "States from a foreign port, pursuant to the then existing "laws of the several States, shall be valid, and no action "shall be maintained against any such State or municipal "officer or corporation for the recovery of any moneys so "paid or collected prior to said date." By the United States' Registry and Enrollment acts the plaintiff, being a foreign corporation located in Great Britain, was limited to transportation from foreign ports (R. S. §§ 4131–4135 and 4311–4312).

This action was pending when this act was passed. It was its *causa causans* as appears by the letters printed in the Congressional Record accompanying the introduction of the bill on June 8th, 1878. It was for that reason the word "maintained" was used in *contra* distinction to "brought." "No action shall be maintained."

The only element wanting in the contracts between plaintiff and defendant was the *consent* of Congress—their validity hinged upon such consent. There is no *vested right* in any one to avoid his agreement, or to recover money paid upon an equitable consideration—money collected from the emigrant by the plaintiffs and paid to the defendant and expended by the defendant for the maintenance of the emigrants.

Congress having power to pass the act, the fact that the law incidentally affects vested rights or the obligation of contracts does not render it void.

As to obligation of contracts, see page 549,

As to vested rights, see page 551,

Legal Tender cases, 12 Wallace.

The grant to Congress to pass all proper and necessary laws for due execution of powers conferred upon it is not impaired by the fact that a law incidentally affects existing rights.

Hague vs. Powers, 39 Barb., 427, 470, 471.

See as to Powers of State, with "consent of Congress" to make something else but specie legal tender, page 428.

As to obligation of contracts, see page 452.

Metropolitan Bank vs. Vand Dyck, 27 N. Y., 400.

George vs. Concord, 45 N.H., 434.

VI. THE LEGAL EFFECT OF A RATIFICATION BY A SOVEREIGN POWER IS TO RELIEVE THE ACTOR FROM LIABILITY FOR ACTS WHICH THE SOVEREIGN HAD POWER TO AUTHORIZE ORIGINALLY.

In Buron vs. Dennison, 2 Exch., 167, the defendant, an English naval commander, stationed off the coast of Africa to suppress the slave trade, was requested by the Governor of Sierre Leon to obtain the release of two British subjects, detained as slaves at Gallinas, by the son of the king of that country. Defendant did so, liberated the two men and concluded a treaty for the abolition of the slave trade. In executing the treaty defendant fired the baracoons of plaintiff, a Spanish subject, and carried off his slaves to Sierre Leon, where they were liberated. Defendant reported the facts to the Lords of Admiralty and Secretaries of State of the Foreign and Colonial Departments, who, by letter, adopted and ratified his act.

Held, by the Court in banc, in an action of trespass against the defendant, after stating that the ratification by a private person was equivalent to a prior command, "the question is "whether the act of the sovereign ratifying the act of one of "his officers can be distinguished. On that subject I have con-"ferred with my brethren, and they are decidedly of the opin-

"ion that the ratification of the Crown, communicated as it "has been, in the present case, is equivalent to a prior com- "mand." To this Baron PARKE reluctantly assents, because he says: "If the Crown ratifies an act, the character of the act be- "comes altered, for the ratification does not give the party in- "jured the double option of bringing his action against the "agent who committed the trespass or the principal who rati- "fied it, but a remedy against the Crown only" (such as it is) "and actually exempts from all liability the person who com- "mits the trespass."

Congress *had* power to adopt the tax and authorize the defendant to collect and expend it. It follows that Congress had power to adopt and appropriate it *after* its collection. If where the act had been originally authorized there would have been no liability of the agent, the same effect cannot be denied to the ratification without nullifying the sovereign power to adopt and ratify.

8. P.—The Secretary of State in Council of India vs. Kamacher Boye Lahaba, 7 Ind. App., 476; same case, 13 Moore Rep. (Privy Coun.), 22.

VII. THE TAX A REGULATION OF COMMERCE AND SUBJECT TO NO OTHER RESTRICTIONS.

In any view, this power of Congress is by its very nature entirely distinct: *First*, from the power to levy a capitation tax on the inhabitants of the United States. The capitation tax must be laid "*in proportion to the census*," and, therefore could not include a tax on the landing of alien immigrants. To so hold would render it impossible to levy such a tax at all. *Secondly*, the headmoneys are not "duties, imposts or excises," and therefore do not come under the provision requiring such to be "uniform throughout the United States." They are not "*excises*," because *excises* are purely internal taxes. They are not "*duties*" or "*imposts*" because they are constitutionally defined as applicable solely to imports and exports; (Art. 1, § 10, subd. 2), and this Court has decided that passengers were not "*imports*," and that the headmoneys levied on them did

not come under the heading of imposts (People of New York vs. Compagnie Générale Transatlantique, 107 U. S., 59). Mr. Justice BLATCHFORD explicitly holds as to the headmoneys now levied on the landing of alien passengers by Congress that they come exclusively within the power to regulate commerce, and are not subject to the restrictions on capitation taxes, duties, imposts or excises.

Headmoney Cases, 18 Fed. Rep., No. 3, p. 135.

"The Constitution considered these" (the general taxing power, and the power to regulate commerce) "as substantive and distinct from each other." So held in—

Gibbons vs. Ogden, 9 Wheat., 199, 200.

Hence the head-moneys being a regulation of commerce did not come under the general taxing power at all.

Now the only restriction on the power of Congress to regulate commerce is:

"No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another." (Art. 1, § 9, Subd. 5).

Manifestly this provision is not violated unless some State can maintain that a preference has been given to the ports of some other State.

No such claim can be maintained as to the validating Act of Congress, for two reasons:

1ST. It applies impartially to "every State" and every State was equally free to have collected such headmoneys. It is no objection to say that they did not all need or desire to levy them. *Their voluntary inaction* does not make the *general ratification of Congress discriminating.* Other States besides New York levied such headmoneys, as shown by the cases decided with the Henderson Case.

2D. Even if *Congress levied* such headmoneys exclusively on passengers landing at New York, *that would not have given the port of New York a preference* over the ports of other States. Now the validation of the State tax is its adoption by Congress, so that it may now be considered as having been levied by Congress. Again, the validation of "*the acts*" of the State officers was a ratification which relates back and constitutes them agents of the Federal Government. Hence, even if the validat-

ing act had been limited to New York, the question on this point would be: If Congress and New York concurred in levying headmoneys on alien immigrants landed at New York, for the care of those becoming a public charge, would such a tax or its appropriation be a violation of the Constitution?

Here it is evident that the tax on the port of New York does not give *it* a *preference*, and being levied with the concurrence of New York, no State can complain of preference being given to others. It is equally certain that a mere subsequent appropriation of revenues to expenses is not in itself a regulation of commerce at all. "It is an objection to and not a ground of prefer-
" ence of a port that a charge of this kind must be borne by ves-
" sels entering it; and accordingly the interests of a port require,
" and generally produce such alleviations of these charges as its
" growing commerce from time to time renders consistent with
" the general policy of the pilot laws."

Cooley vs. Bd. of Wardens, 12 How., 315.

The construction of the commerce clause by this Court, in an opinion by Mr. Justice NELSON makes it very clear that Congress has not exceeded its powers here. No abridgement can properly present the subject, and the Court are therefore respectfully referred to the opinion.

State of Pennsylvania vs. The Wheeling & Belmont Bridge Co., 18 How., 434, 435.

Uniformity of tax might in itself be a preferential regulation. If the expense of caring for the immigrant at the Port of New York was fifty cents a head and at Boston and Baltimore a dollar a head, owing to the fact that the greater the number the less the cost *per capita*, a uniform tax of fifty cents a head would throw one half the burden of the commerce of Boston and Baltimore on Massachusetts and Maryland, or leave one-half the immigrants at those ports wholly unprovided for, or make the service inefficient; while a tax at $1 a head would place a burden on the commerce of New York double that required; while an average tax of seventy five cents, to be disbursed according to cost, would tax the commerce of New York to pay the expenses incident to the commerce of Boston and Baltimore.

A tax measured by the needs of each port is as non-prefer-

ential as any which can be suggested. Is matter-of-fact not law? is matter for Congress to determine, and not the Courts.

VIII. SUSTAINABLE AS A RESTRICTIVE TAX ON IMMIGRATION.

It was held in the *Passenger Cases* that Congress had the power to levy a tax on the importation or immigration of persons under its power to exclude aliens by a prohibitory tax, recognized by the ninth section of the first article of the Constitution, as follows: "The migration or importation of such persons as any of the States shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808, but a tax or duty may be imposed, on such importation, not exceeding ten dollars for each person."

This power to levy a prohibitory or restrictive tax on the *immigration of aliens* is concurrent with, but distinct from the power to tax the *transportation of passengers* as a regulation of commerce. In both cases the tax would be practically the same; but the powers are entirely different. A single consideration is decisive of this. The levy of a tax on the landing of *passengers* as a commercial transaction is applicable to all persons citizen or alien, while the levy of a prohibitory or restrictive tax on "*immigration*" is, by that very term, confined to aliens. This latter power is exercisable absolutely under the power to *exclude* them, without reference to the appropriation of the tax. Hence, its appropriation could not defeat it.

As held in the *Passenger Cases*, and approved in the *Henderson Case*, "a right to exclude is a power to tax" (7 How., 461), and includes any prohibitory or lesser tax on the admission of aliens (7 How., 449). Now, the Constitution not only declares this power of exclusion to reside in Congress, but to be *without any limitation* subsequent to the year 1808. It cannot then be limited by reference to limitations on the other and distinct powers of taxing the people of the United States to carry on the Federal Government and of regulating commerce.

This power to exclude any or all aliens is, moreover, an essential attribute of the federal sovereignty (1) in determining who shall become inhabitants, with the consequent privilege

of citizenship, and (2) in providing for the general welfare in its sovereign discretion. The Constitution contains no limitation on any of these powers, and certainly none can be raised by implication; not in the present case, at any rate. Here, it must be conceded, that Congress *should* have power to exclude the Chinese from the Pacific States, where they have become too numerous, without keeping them out of the Atlantic States, where more of them may be desired as artizans; also, that in times of slavery, it could have prohibited the landing of any African negroes in the slave States to prevent their being enslaved, without prohibiting their landing in free States.

However this may be, any construction of the Constitution, which would divest both Congress and the several States from *jointly* restricting the immigration of aliens into those States, objecting to them and allowing their admission to those States desiring them, would at once *defeat the combined will of Congress and all the States together. What becomes of the sovereign power then?* No such paralyzing prohibition finds any existence in the Constitution. Even duties and imposts are leviable by the State with consent of Congress.

Hence, as Congress had, with the concurrence of the State, the absolute right to levy a restrictive tax on immigration without reference to its appropriation, it is immaterial what that appropriation was.

IX. COURTS DO NOT REGARD RIGHTS AS VESTED CONTRARY TO THE JUSTICE AND EQUITY OF THE CASE.

Equity and justice require the steampship companies to pay for the support of those of their passengers who become a public charge. Besides, the head-moneys were collected from the passengers. The money is theirs, not that of the plaintiff.

There is no *right* in a party to avoid his contract.
There is no *vested right* to do *wrong*.

Foster vs. Essex Bank, 16 Mass., 245.
Dentzel vs. Waldie, 30 Cal., 138.
State vs. City of Newark, 27 N. J., 197.
Underwood vs. Lilly, 10 Sug. and R., 101.
State vs. Stooltefooz, 16 Sugd. and R., 35.

Watson vs. Mercer, 8 Pets., 88–110.
Carpenter vs. Commonwealth, 17 How., U. S., 456.
Davis vs. The State Bank, 7 Ind., 316.
Goshorn vs. Purcell, 11 Ohio, N. S., 641.
Gibson vs. Hibbard, 13 Mich., 215.
State vs. Norwood, 12 Md., 195.
Grim vs. Weissenberg, 57 Pa., 435.

X. THE CIRCUIT COURT HAD NO JURISDICTION OF THE ACTION.

"And *no action shall be maintained* against any such State "or municipal officer or corporation for the recovery of any "moneys so paid or collected prior to said date."

C. 127, U. S. Laws 1877, Vol. 20, p. 177.

The clause, "No action shall be *maintained*," must be construed, *No action shall be carried on or continued.* "*Maintain*" is defined by WORCESTER, "*To uphold; to sustain; to keep up; to continue; to carry on.*"—WEBSTER, "*to hold or keep in a particular state or condition; to keep up; to continue.*" From its derviation, maintain means *to hold in hand*, from the French *main-tenir*. Hence, applied to the courts, they shall not hold any suit in hand.

The words "no action shall be maintained" must be directed to the U. S. Circuit Courts to give them any effect. The rest of the act is devoted to validating the collection of head-moneys, and are effectual for that purpose without the last clause. The Court will give them legal constitutional effect rather than render them nugatory. This clause is an avowal by Congress that the Federal Courts shall not be used to enforce an unjust and inequitable claim, whatever the State Courts may permit, and this was within the direct power of Congress.

"The judicial power of the United States shall be vested in "one Supreme Court, and in such inferior courts as the Con-"gress may from time to time ordain and establish."

Article III., Section 1, U. S. Constitution.

In Cary vs. Curtis, 3 How. U. S., 409, 415, DANIEL, J., delivering the opinion of the Court:

"It is contended, however, that the language and the pur-
" poses of Congress, if really what we hold them to be declared
" in the Statute of 1839, cannot be sustained, because they would
" be repugnant to the Constitution, inasmuch as they would
" debar the citizen of his right to resort to the courts of justice.
" The supremacy of the Constitution over all officers and au-
" thorities, both of the Federal and State Governments, and the
" sanctity of the rights guaranteed by it, none will question.
" These are *concessa* on all sides. The objection above referred
" to admits of the most satisfactory refutation. This may be
" found in the following positions, familiar in this and in most
" other governments, namely: that the Government, as a gen-
" eral rule, claims an exemption from being sued in its own
" courts. That although, as being charged with the adminis-
" tration of the laws, it will resort to those courts as means of
" securing this great end, it will not permit itself to be im-
" pleaded therein, save in instances forming conceded and ex-
" press exceptions.

"Secondly, in the doctrine so often ruled in this Court, that
" the judicial power of the United States, although it has its
" origin in the Constitution, is (except in enumerated instances
" applicable exclusively to this Court) dependent for its distribu-
" tion and organization, and for the modes of its exercise, en-
" tirely upon the action of Congress, who possess the sole power
" of creating the tribunals (inferior to the Supreme Court) for
" the exercise of the judicial power, and of investing them with
" jurisdiction either limited, concurrent, or exclusive, and of
" withholding jurisdiction from them in the exact degrees and
" character which to Congress may seem proper for the public
" good. To deny this position would be to elevate the judicial
" over the legislative branch of the Government, and to give to
" the former powers limited by its own discretion merely. It
" follows, then, that the Courts created by statute must look to
" the statute as the warrant for their authority; certainly they
" cannot go beyond the statute, and assert an authority with
" which they may not be invested by it, or which may be
" clearly denied to them. This argument is in nowise impaired
" by admitting that the judicial power shall extend to all cases
" arising under the Constitution and laws of the United States.

" Perfectly consistent with such an admission is the truth that " the organization of the judidial power, the definition and dis- " tribution of the subjects of jurisdiction in the federal tri- " bunals, and the modes of their action and authority, have " been, and of right must be, the work of the Legislature. The " existence of the Judicial Act itself, with its several supple- " ments, furnishes proof unanswerable on this point. The " Courts of the United States are all limited in their nature and " Constitution, and have not the powers inherent in courts ex- " isting by prescription or by the common law."

XI. Plaintiff's Mistake of Law.

There is a struggle made in the declaration to bring this action within the doctrine of payments made under a mistake of fact; as where two parties in one country contract in ignorance of the law of another country, where the contract is to be performed In that case the parties, not being bound by law to know the law of the foreign country, are allowed to prove the *fact* that they did not know the law. This does not make the mistake of law a mistake of fact. It simply allows the parties to prove that their minds did not meet *because* they did not know the law.

In the case at bar the contract, or cause of action, arose in New York; the payments were made in New York, under a New York law, by a person within the jurisdiction of that law. All the *facts* were known; the law they are conclusively presumed to know.

Plaintiff protested; on this protest it seeks to recover. A protest precludes ignorance, it asserts knowledge of the claim now sought to be enforced with the protest as its foundation.

XII. Repealed Laws cited by Plaintiff's Attorney below.

Under the repealed laws of 1844, there was a provision that the moneys directly levied thereby, should, if paid under protest, be turned into the State treasury, solely as a condition of the State's holding the health-officer harmless from any personal liability. This provision had no other object or effect, and even

when in force, if disregarded, it simply left the rights of the parties *in statu quo*, no special effect being given to the protest.

Again the Act of April 11th, 1849, Chap. 350 by Section 19, which transferred the Marine Hospital to the charge of Commissioners of Emigration, also repealed the fees theretofore collected for the Marine Hospital by the health-officer.

Summary of Plaintiff's Brief.

The plaintiff claims that the only question for review is the validity and effect of the Act of Congress of June 19, 1878, upon plaintiff's cause of action. This itself involves the consideration of the cause of action.

The authorities cited, in support of the position, that this Court is confined to the determination of the abstract moot question of the validity of an Act of Congress without regard to its relation to the cause of action do not sustain it.

It is true that no errors except those appearing on the record will be ground of reversal.

It is equally true that a correct judgment will not be reversed because the reasoning which led to it was erroneous. The authorities go no further than this; objections which might be obviated at the trial must be pointed out there to be availed of on appeal, but when the objection cannot be obviated or where every fact the plaintiff alleges is admitted and still no cause of action appears, not from mere technical defects, but from the inherent nature of the case the judgment will be affirmed because no error requiring a reversal appears on the record.

Before the plaintiff can invoke the constitution as against the Act of Congress it must affirmatively appear that it has a right of action. If it has no right of action, no right has been invaded.

The defendant in error maintains the State law levying a tax was not a duty, nor impost, nor excise, and therefore, not required to be uniform.

Blatchford, J., Headmoney Cases, *supra*.

The levying by a State of a tax upon its own commerce was not a preferential regulation.

Cooley vs. Board of Wardens, *supra*.

If the money was voluntarily paid or the law raised up no implied promise of repayment, then plaintiff had no property in the money, no vested right, and therefore lost nothing by the act of Congress. If, however, Congress could appropriate the money or validate its collection, then its act was due process of law.

The right to sue or to maintain a suit in the Circuit Court of the United States is not a vested right.

Cary vs. Curtis, *supra*.

The right to sue in the State Courts remains.

The right to sue the United States in the Court of Claims became vested in plaintiff by the act of Congress (R. S., § 1059), and the remedy against the State was wholly unaffected by the act.

The act is altogether retroactive. Such is its intention plainly expressed. It could have no other possible effect. "No action "shall be maintained for the recovery of *any* moneys so paid or "collected prior to said date."

The plaintiff's theory that the institution of a suit creates a vested right or adds to its right a quality which deprives the Legislature of power to legislate over the subject adversely to it, is both novel and unsupported by authority. The construction of a statute may be affected by such fact, but not its effect. To be of any effect the law must be retroactive.

CONCLUSION.

1st. The plaintiff's payment was voluntary.

2d. The payment being made to the Chamberlain, gave no right of action against this defendant in any case, there being no privity. If the plaintiff hold to the allegation of the declaration that payment was made directly to this defendant then it was clearly voluntary as the law did not require it.

3d. The validation by Congress was equally effectual whether payment was voluntary or involuntary.

4th. In any case the Act of Congress cut off the suit in the Circuit Court.

JUDGMENT should be affirmed with costs.

LEWIS SANDERS,
GEORGE N. SANDERS,
Of Counsel for Defendant in Error.

APPENDIX.

Statutes of New York bearing on the Question.

Chap. 195.

An Act concerning passengers in vessels coming to the City of New York.

Passed May 5, 1847.

§ 1. "Within twenty-four hours after the landing of any passenger from any ship or vessel arriving at the port of New York, from any of the United States other than this State, or from any country out of the United States, the master or commander of the ship or vessel from which such passenger or passengers shall have been landed shall make a report in writing, on oath or affirmation, to the Mayor of the City of New York; or, in case of his absence, or other inability to serve, to the person discharging the duties of his office, which report shall state the name, place of birth, last legal residence, age and occupation of every person or passenger who shall have landed from such ship or vessel on her last voyage to said port not being a citizen of the United States, and who shall have, within the last twelve months, arrived from any country out of the United States, at any place within the United States, and who shall not have paid the commutation money, or been bonded according to the provisions of this act, or of the act hereby amended, or of the Act of February eleventh, eighteen hundred and twenty-four, concerning passengers in vessels coming to the port of New York, nor paid commutation money under the provisions of this or any former act. The same report shall contain a like statement of all such persons or passengers aforesaid, as shall have been landed, or been suffered to land from any such ship or vessel at any place during such last voyage, or who shall have been put on board, or suffered to go on board, of any other ship, vessel, or boat, with the intention of proceeding to or landing at the said City of New York, or elsewhere within the limits of this State. The said report shall further specify whether any of the said passengers so reported are lunatic, idiot, deaf, dumb, blind,

infirm, [maimed, or above the age of sixty years; also designating all such passsngers as shall be under the age of thirteen, or widows having families, or women without husbands having families, with the names and ages of their families], and shall further specify particularly the names, last place of residences, and ages of all passengers who may have died during the said last voyage of such vessel; also the names and residences of the owner or owners of such vessel. In case any such master or commander shall omit or neglect to report as aforesaid any such person or passenger, with the particulars aforesaid, or shall make any false report or statement in respect to any such person or passenger, or in respect to the owner or owners of any such vessel.

"Or in respect to any of the particulars hereinbefore specified, such master or commander shall forfeit the sum of seventy-five dollars for every such passenger, in regard to whom any such omission or neglect shall have occurred, or any such false report or statement shall be made, for which the owner or owners, consignee or consignees of every such ship or vessel shall also be liable, jointly and severally, and which may be sued for and recovered as hereinafter provided (as amended by § 3, Chap. 523, Laws 1851).

§ 2. * * * "It shall be lawful for any owner or consignee at any time within twenty-four hours after the landing of such persons or passengers from any ship or vessel in the port of New York, except as in the section hereinafter provided, to commute for the bond or bonds so required, by paying to the health commissioners of the City of New York, the sum of one dollar and fifty cents for each and every passenger reported by him as by law required; the receipt of such sum by said health commissioners shall be deemed a full and sufficient discharge from the requirements of giving bonds as above provided. The said health commissioner is hereby required to pay over daily the said money, with an account thereof, to the chamberlain of the City of New York. But no owner or consignee shall be authorized to commute for the bond so required for any passenger arriving in the port of New York, between the first day of December and the fifteenth day of April, who may be sent to the marine hospital from shipboard by the health officer, or by the authority of the board of health of the City of New York, on account

"of illness from ship fever. The commissioners of emigra-
"tion shall have authority to commute specially for any bond
"in such cases at such rates and in such manner as shall ap-
"pear to them equitable and proper. It shall be the duty of
"the health officer to report without delay to the commissioners
"of emigration the names of all passengers sent by his order
"during the above mentioned period from shipboard to the
"marine hospital on account of illness from ship fever. For
"the duties performed by the health commissioner and named
"in this section, he shall be paid by the commissioners of emi-
"gration at the rate of seventeen hundred and fifty dollars per
"annum, and he shall be paid the remainder of his salary by
"the mayor, aldermen and commonalty of the City of New
"York. And at and after the expiration of the term of the
"present health commissioner, it shall be lawful for the com-
"missioners of emigration to select for the performance of the
"duties named in this section and now performed by the com-
"missioner of health, either the mayor of the City of New
"York, or the chamberlain of said city, or the health commis-
"sioner, and the compensation for the performance of said
"duties shall be so much as such officer so selected and the
"commissioners of emigration may agree upon, and thereafter
"the salary of the health commissioner shall be fixed by the
"mayor, aldermen and commonalty of the City of New York,
"and paid from the treasury of said city."

(As amended, § 7 c. 523, Laws 1851).

"§ 3. It shall be the duty of the Commissioners of Emigration, hereafter named, to examine into the condition of passengers arriving at the port of New York, in any ship or vessel, and for that purpose all or any of the said commissioners, or such other person or persons as they shall appoint, shall be authorized to go on board and through any such ship or vessel, and if on such examination there shall be found among such passengers any lunatic, idiot, deaf, dumb, blind, [maimed,] or infirm persons, or [persons above the age of sixty years, or widow with a child or children, or any woman without a husband and with a child or children, or any person unable to take care of himself or herself without becoming a public charge,] or who, from any attending circumstances, are likely to become a public charge, or who, from sickness or disease, existing at the time of depar-

ture from the foreign port, are or are likely soon to become a public charge, they shall report the same to the said Mayor particularly, and thereupon, and unless a bond, as required in the second section of this act, shall have been given, the said Mayor, or the person discharging the duties of his office, shall require in the endorsement to be made as aforesaid, or in any subsequent endorsement or endorsements thereon, and in addition to the commutation money that the owner or consignee of such ship or vessel, with one or more sufficient sureties, shall execute a joint and several bond to the people of the State in a penalty of five hundred dollars for every such passenger, conditioned to indemnify and save harmless the Commissioners of Emigration, and each and every city, town or county within the State from any further cost or charge, which said commissioners or any such city, town or county shall incur for the maintenance or support of the person or persons named in such bond or any of them within [five] years from the date of such bond. The sureties to the said bonds shall be required to justify before and to the satisfaction of the officer making such endorsement, and by their oath or affirmation shall satisfy snch officer that they are respectively residents of the State of New York, and worth double the amount of the penalty of such bond over and above all debts, liabilities and all property exempt from execution. The subsequent endorsement authorized in this section may be made at any time within [thirty] days after such examination, or of the landing of any such person or passengers (as amended by § 4, Chap. 523, Laws of 1851).

"§ 4. The said commissioners shall be known as the "Commissioners of Emigration," and by that title shall be capable of suing and being sued. The money so as aforesaid to be paid to the Chamberlain of the City of New York, shall be paid out on the warrant of the said commissioners, or a majority of them. It shall be the duty of the said commissioners to provide for the maintenance and support of such of the persons for whom commutation money shall have been paid as aforesaid, or on whose account bonds shall have been taken as aforesaid, as would otherwise become a charge upon any city, towu or county of this State; and the said commissioners shall appropriate the moneys aforesaid for that purpose, in such manner as to indemnify, so far as may be, the several cities, towns and counties of the State, for any expense or charge which may be incurred

for the maintenance and support of the persons aforesaid, such appropriation shall be in proportion to the expenses incurred by said cities, towns and counties, severally, for such maintenance and support. And the more fully to effect the object contemplated by this act the said commissioners are authorized to apply, in their discretion, any part of the said money, to aid in removing any of said persons from any part of this State to another part of this or any other State or from this State, or in assisting them to procure employment and thus prevent them from becoming a public charge: The said commissioners are also authorized in their discretion to apply any part of the said moneys to the purchase or lease of any property, or the erection of any building which they may deem necessary for the purposes aforesaid. But any expense so incurred by the commissioners in any city, town or county, shall be charged to the share of such moneys which any such city, town or county shall be entitled to receive thereof, for expense incurred in the support or maintenance of the persons for whom commutation money shall have been paid as aforesaid, or on whose account bonds shall have been taken as aforesaid.

"§ 5. In case any of the persons for whom commutation money has been paid as aforesaid, or for whom a bond has been given as aforesaid, shall, at any time within five years from the payment of such money or the execution of such bond, become chargeable upon any city, town or county within this State, it shall be the duty of the said commissioners to provide for the payment of any expense incurred by any such city, town or county, for the maintenance and support of any such person, out of the commutation money to be paid as aforesaid, and the moneys collected on such bonds, so far as the same will enable them to do so. The said commissioners shall prescribe such rules and regulations as they shall deem proper for the purpose of ascertaining the right and the amount of the claim of any city, town or county, to indemnity under the provisions of this and the preceeding section. The said commissioners shall have power to provide for the support and maintenance of any persons for whom commutation money shall have been paid or on whose account a bond shall have been given as hereinbefore provided, and who shall become chargeable upon any city, town or county, in such manner as they shall deem proper; and after such provision shall have been made by such commissioners such

city, town or county shall not be entitled to claim any further indemnity for the support and maintenance of such person.

"§ 7. The Chamberlain of the City of New York shall, on the first Monday of January, in every year, and at such other times as he shall be thereunto required by the said Commissioners, report to them the amount of money received by him since his last previous report, for commutation money as aforesaid, and the amount of such moneys remaining in his hands.

"§ 8. The said commissioners shall annually, on or before the first day of February in each year, report to the Legislature the amount of moneys received under the provisions of this act during the preceding year, and the manner in which the same has been appropriated particularly.

"§ 11. If any master or commander as aforesaid, shall neglect or refuse to pay over to the said chamberlain such sum of money as is hereinbefore required for commutation money for each and every such person, within three days after the arrival of such vessel at the port of New York, or shall neglect or refuse to give any bond so required as aforesaid, within the said three days, every such master or commander, and the owner or owners of such ship or vessel, severally and respectively, shall be subject to a penalty of three hundred dollars for each and every person and passenger on whose account such commutation or such bond may have been required, to be sued for in the manner hereinafter provided.

"§ 12. The penalties and forfeitures prescribed by this act may be sued for and recovered with costs of suit, by and in the name of said Commissioners of Emigration, in any court having cognizance thereof, and when recovered shall be applied to the purposes specified in this act. It shall be lawful for the said Commissioners before or after suit brought to compound for any of the said penalties or forfeitures upon such terms as they shall think proper.

"§ 13. Any ship or vessel whose master or commander, owner or owners, shall have incurred any penalty or forfeiture under this act, or under the act of 11th April, 1849, amending the same, entitled "An Act to amend certain acts concerning passengers coming to the City of New York," shall be liable for such penalties or forfeitures which may be a lien upon such ship or vessel, and may be enforced and collected by warrant of attachment in the same manner as is provided in title eight of

chapter eight of the third part of the Revised Statutes, all of the provisions of which title shall apply to the forfeitures and penalties imposed by this act; and the said Commissioners of Emigration shall, for the purposes of such attachment, be deemed creditors of such ship or vessel, and of her master or commander, and owner or owners respectively." (As amended by § 1, Chap. 339, Laws of 1850.)

CHAP. 339.

An act to amend the act entitled "An Act concerning passengers in vessels coming to the City of New York," passed May 5th, 1847; also to amend the act entitled "An Act to amend certain acts concerning passengers coming to the City of New York," passed April 11, 1849. Passed April 10, 1850.

§ 2. The fifth section of the act entitled "An act to amend certain acts concerning passengers coming to the City of New York," passed April 11th, 1849, is hereby amended so as to read as follows: "If any owner or consignee as aforesaid shall refuse or neglect to give any such bond or bonds as hereinbefore required, according to the second section of this act, for each person or passenger landing from his ship or vessel, within three days after the landing of such persons or passengers, or shall not within that time have paid the moneys authorized by said second section, to be received in cases where such bonds are herein authorized to be commuted for, or shall refuse to neglect to give the bonds required by the third section of this act, to be given in certain cases, on the requirement of the Mayor of the City of New York, or other person discharging the duties of his office, made according to the provisions of said section, within six days after such requirement being so made, every such owner or consignee of such ship or vessel, severally and respectively, shall be subject to a penalty of five hundred dollars for each and every person or passenger on whose account such bond may have been required, or for whom such commutation money might have been paid under this act; such penalty to be sued for as provided for in the twelfth section of the said act hereby amended, in every case where any fine, penalty or forfeiture shall be incurred by the owner or owners, consignee or consignees, master or commander of any vessel arriving at the port of New York, under any of the provisions of the acts concerning passengers coming to the City of New

York, passed 5th May, 1847, and of this act, by reason of their neglect or refusal to give the bonds or any of them, required by law, the consignee of such passengers, in relation to whom such neglect or refusal shall have occurred, shall be liable in the same penalties, and may be sued and recovered against in the same manner as is by law provided in relation to the owner or owners, consignee or consignees of the vessel.

Authorities on Voluntary Payments.

Nearly all the cases in which the Courts have decided that money was voluntarily paid, and could be recovered back, may be classified as follows:

(*a*) Money paid under a mistake of fact, even though the party paying has omitted to take advantage of means of knowledge within his reach.

(*b*) Money paid under a judgment which has been reversed, even though no execution has been issued, and there is no actual duress of person or property, and *a fortiori* if execution has been issued, and a levy has been made on property or defendant's body has been taken.

Lott vs. Swezey, 29 Barb. (N. Y.), 87.
Bank of U. S. vs. Bank of Washington, 6 Peters (U. S.), 8.
Clark vs. Pinney, 6 Cowen, 297.
Sturgis vs. Allis, 10 Wend., 355.

(*c*) Where legal process has been colorably and fraudulently used to enforce a fictitious demand, and the money has been paid to relieve the person from arrest.

Duke de Cadaval vs. Collins, 4 Adolph & Ellis, 558; 6 Nev. & Man, 324.

(*d*) Money paid to obtain possession of goods illegally or wrongfully obtained or held.

Maxwell vs. Griswold, 10 How. (U. S.), 257.
Marriott vs. Brune, 9 How. (U. S.), 619.
Elliott vs. Swartwout, 10 Peters, 156.

(Duties illegally exacted and paid collector, under protest to obtain possession of goods in collector's possession.)

Clinton vs. Strong, 9 Johnson (N. Y.), 370.

(Costs and fees, for which owner was not liable, paid to obtain release of vessel from custody of marshal.)

(*e*) Money exacted as a condition of the performance of some act which the defendant was legally bound to perform without payment of the money, and where the parties did not stand on an equal footing, or where the party paying had no practical and expeditious way of obtaining his rights, except by paying the money.

Ripley and others vs. Gelston, 9 Johnson (N. Y.), 201.

(Tonnage or light money paid collector to obtain clearance of vessel wrongfully withheld.)

Townsend vs. Dykman, 2 E. D. Smith (N. Y.), 225.

(Illegal fee exacted to see a will.)

Hearsey vs. Pruyn, 7 Johnson (N. Y.), 179.

(Illegal tolls exacted by toll gatherer of a bridge.)

Nicholson vs. Gooch, 5 E. & B., 999.
Ashmole vs. Wainwright, 2 Q. B., 846.

(Exorbitant remuneration demanded by carrier as condition of delivering goods.)

Parker vs. Great Western R. R., 7 M. & Gr., 253.

(Money illegally exacted as condition of carrying plaintiff's goods on defendant's railroad.)

Wakefield vs. Newbon, 6 Q. B., 276.
Close vs. Phipps, 7 M. & Gr., 586.

(Money paid by mortgagor to obtain possession of title deeds withheld by attorney of mortgagee on unfounded claim of lien.)

(*f*) Where there has been actual duress of person without legal process, or violent threats of legal proceedings, and injury to person or character.

Forshay vs. Ferguson, 5 Hill, 154.
Eadie vs. Slimmon, 26 N. Y., 9.

(*g*) Money paid under such circumstances that it could be collected in a summary way by distress of goods, or sale of real estate, *without any legal proceedings*.

Peyser vs. The Mayor, &c., 70 N. Y., 497.

(Assessment for local improvement, which had been vacated (after payment) for irregularity, which did not appear on the face of the proceedings, and where such assessment could have been collected by distress of goods or sale of lands, *without legal proceedings.*)

Bank of Commonwealth vs. The Mayor, &c., 43 N. Y., 188.

(Tax paid by bank which, after payment, was decided to be illegal, but which, until such decision could have been collected by distress and sale of goods, *without legal proceedings.*)

Boston and Sandwich Glass Co. vs. City of Boston, 4 Metcalfe, 188.

(Action to recover illegal tax, not paid under protest, in which it was held that payment was involuntary, and that money could be recovered. "Such warrant is in the nature of "an execution running against person and property of the "party, upon which he has no day in court, no opportunity to "plead and offer proof, and have a judicial decision of the ques- "tion of his liability.")

Grimm vs. Weisenberg School District, 57 Penn. St., 433.

(Held, that illegal tax paid under protest could be recovered. "A party who is *threatened with a distress*, and pays illegal "tax under protest and notice of suit may recover it back.")

Valvey vs. Manley, 1 C. B. (Eng.), 593.

(In this case it was held that money paid sheriff, who had a writ, and had made, or was about to make, a levy, by assignees in bankruptcy, who had paid the money to preserve the goods from sale, could be recovered.)

(8) The ground upon which all the above cases and a great number of similar ones have been decided, is, that in every instance the payment was compulsory from coercion either in fact or by law, and being for that reason involuntary, the money could be recovered back. And the general rule as to what constitutes an involuntary payment, deducible from a great number of American and English cases, is stated in a very clear and comprehensive manner by Judge Folger, who delivered the

opioion of the Court in Peyser vs. The Mayor, *supra*. The learned Judge said:

"The payment must be involuntry, which is tantamount to "saying that it must be compulsory from coercion either in "fact or by law. The reason of this principle is, that a person "shall not be permitted, with the knowledge that the demand "upon him is illegal and unfounded, to make payment without "resistance, where resistance is lawful and possible, and after- "wards to choose his own time to bring an action for restora- "tion, when, perchance, his adversary has lost the evidence to "sustain his side. I have spoken of coercion in fact and by law. "By the first I mean that duress of person or goods where present "liberty of person, or immediate possession of goods, is so need- "ful and desirable as that an action or proceeding at law to "recover them will not at all answer the pressing purpose. * * "Coercion by law is where a court, having jurisdiction of the "person and subject matter, has rendered a judgment which is "collectible in due course. There the party cast in judgment "may not resist the execution of it. His only remedy is to ob- "tain a reversal, if he may, for error in it. As he cannot resist "the execution of it when execution is attempted, he may as "well pay the amount at one time as at another, and save the "expense of delay. * * * To such case of coercion by law, "as is above given, are to be added those *quasi* adjudications of "inferior tribunals, such as assessors of taxes and assessments; "where their proceedings are regular on their face, and on "presentation make out a right to have and demand the "amount levied in due course of law by sale of goods, or mu- "nicipal lease of real estate. Unless void on their face they "have the force of a judgment; the party is legally bound to "pay, and has no lawful mode of resisting. The only remedy "is a reversal of the adjudications. Until reversed, they give "the collector the right to take and sell goods, and the assess- "ment remains a *prima facie* valid lien upon real estate."

In Bank of the Commonwealth vs. The Mayor, *supra*, the same rule was laid down by GROVER, J., who said:

"From the complaint, it appears the tax was paid before the "reversal of the assessment. While that remained in force the "tax founded thereon had the force of a judgment requiring

" the plaintiff to pay the tax as required by the statute. The " plaintiff was legally bound so to pay, and had no lawful mode " of resisting such payment. In such case the only resistance " to the requirement of the officer charged with the collection of " payment, if that could have been made, would only subject " the plaintiff to further expense, and would have been entirely " abortive. Under such circumstances, the plaintiffs had the " right to pay, without affecting their right to recover back the " money should the tax thereafter be determined illegal by a " reversal of the assessment on which it was founded. The pay- " ment was not voluntarily made, but coerced by the law which " obliged the plaintiff to make it."

These well-considered opinions and those delivered in the other cases, above cited, and many similar ones, fully establish the principle that, in order to make out a case of involuntary payment under coercion by law, there must be a judgment of a Court; or, a *quasi* judgment of some body or officer; or, some statutory provision *under which payment could be* SUMMARILY ENFORCED, so that the party paying had no lawful means of resistance.

There certainly was no coercion in fact in the case now before the Court; nor, within the principle so established by the cases in which payments have been held to be involuntary, was there any coercion by law.

There was no judgment by a Court, nor by any body, or officer; nor was there any statutory provision under which payment could have been summarily enforced.

The plaintiff paid solely because of the apprehension that *legal proceedings might be commenced against it*, and that, too, under the belief that if such proceedings were commenced, they could be successfully resisted.

(9) We are not, however, compelled to rely upon inferences drawn from the decisions in cases where payments have been held to be involuntary. There is an overwhelming weight of affirmative authority that payments under such circumstances as existed in the present case are voluntary, and that the money paid cannot be recovered back.

Some of the leading cases in which it has been so decided are the following:

Benson and another vs. Munroe, 7 Cushing (Mass.), 125.

This was an action to recover $398.25, paid under protest by the plaintiff, master of the ship *Washington*, to the defendant, who was superintendent of alien passengers for the city of Boston. The State of Massachusetts had a statute similar to that of New York, requiring the payment of head money for each alien passenger landed at the port of Boston. The plaintiff had landed 140 passengers without paying head money, and an action was brought against the owners of the vessel for $30,000 penalties, in which action the vessel was attached. The plaintiff paid $398.25 in settlement of the action, under protest, and the defendant thereupon caused the attachment to be dissolved. Suit was then brought to recover the $398.25. Upon the trial the Court held the statute requiring the payment of head money to be unconstitutional, but ruled that the payment by the plaintiff was voluntary, and directed a verdict for the defendant. On appeal, the ruling of the Judge at Circuit was sustained.

METCALF, J., said: "The Court deem this a plain case. It "is an established rule of law that if a party, with a full knowl- "edge of the facts, voluntarily pays a demand unjustly made "on him, and attempted to be enforced by legal proceedings, he "cannot recover back the money as paid by compulsion unless "there be fraud in the party enforcing the claim and a knowl- "edge that the claim is unjust; and the case is not altered by "the fact that the party so paying protests that he is not an- "swerable, and gives notice that he shall bring an action to re- "cover the money back. He has an opportunity, in the first "instance, to contest the claim at law. He has, or may have, "a day in court; he may plead and make proof that the claim "on him is such as he is not bound to pay."

The learned Judge then reviews a number of English cases, and says:

"Here was no fraud—no attempt to plunder the plaintiff by "legal process. They should have contested the demand made "on them in the suit that was instituted against them; and hav- "ing voluntarily adjusted that demand and relieved their vessel "from seizure, with a full knowledge, or means of knowledge,

" of all the facts of their case, they cannot now be permitted to " disturb that adjustment."

Mayor of Baltimore vs. Lefferman, 4 Gill (Md.), 425.

Under a statute of the State of Maryland and an ordinance of the City of Baltimore the plaintiff was notified to build a wall adjoining his property, at his own cost, and that in case of failure the city would build the wall and collect the expense out of the plaintiff's property. The plaintiff built the wall and brought an action against the city to recover the cost. He obtained a judgment at the Circuit, but on appeal the judgment was reversed.

The Supreme Court held that the statute in question was unconstitutional, but decided that the payment of the expense of the work was voluntary, and could not be recovered.

MARTIN, J., delivering the opinion of the Court, after fully reviewing the English and American cases on the subject, said:

" We consider, therefore, the doctrine as established that a " payment is not to be regarded as compulsory unless made to " emancipate the person or property from an actual and existing " duress imposed upon it by the party to whom the money is " paid; and that payment made under the apprehension, or even " menace, of an impending distress warrant, would not render it " a payment by compulsion.

" The appellee was warned by the notice of 19th June, 1839, " that if the wall was not commenced within three months " the City Commissioners would have it done and charged to his " account, as directed by one of the ordinances; that is, the appellants would direct the wall to be constructed by others and " collect such expenses as might be incurred by suit or distress " in the manner in which paving taxes are collected. * * A " payment under these circumstances is, in law, not regarded as " compulsory in its character."

This decision was reaffirmed in Morris vs. Mayor of Baltimore, 5 Gill, 244, and may be regarded as going further in the direction of holding payments to be voluntary than some of the cases herein cited.

Town Council of Cohawba vs. Burnett, 34 Alabama, 400.

This was an action to recover $1,000 paid for a license to retail spirituous liquors. Ordinances of the Town of Cohawba required all persons retailing spirituous liquors to take out licenses and

pay $1,000 per annum therefor. Persons retailing such liquors without having obtained a license were liable to a fine of $50 a day for every day on which liquors should be retailed, and in default of payment of such fine to imprisonment in the common jail for three days. Plaintiff took out a license and then sued the town to recover the $1,000. The Circuit Court gave judgment for the plaintiff, and the defendant appealed. The Supreme Court reversed the judgment, holding that the ordinance was unconstitutional, but that the payment was voluntary.

WALKER, C. J., in the course of an elaborate and well-considered opinion, said:

"No one can be heard to say that he had the right and the "law with him, but he feared his adversary would carry him "into court, and that he would be unlawfully fined and impris- "oned; and that being thereby deprived of his free will he yielded "to the wrong, and the courts must assist him in the reclama- "tion.

"In consequence of the imperfections incident to all that is "human, wrong may sometimes prevail in the purest and wisest "judicial tribunals; yet, in theory, there is in our law a security "for every right and a redress for every wrong; and the prac- "tical operation of the law corresponds, in the main, with its "profession.

"The authorities fully maintain the proposition that the "mere prospect of judicial proceedings to enforce payment of a "debt not legally due does not make the payment compulsory.

"There is a large class of cases, several of which are to be "found in our own reports, that money paid upon an execution, "issued on a judgment afterwards reversed, may be recovered "back.

"There is another class of cases in which payments of taxes "illegally exacted have been held involuntary; but in all those "cases the tax collector had statutory authority to make a levy, "or a warrant vesting him with such authority.

"These cases, in which money paid upon an erroneous judg- "ment, or upon an execution issued upon such a judgment, or "in discharge of a void assessment of taxes, was held recover- "able, are distinguishable from this, *because there was an ap- "parent subsisting means of enforcing the illegal demand without "a resort to judicial proceedings, and without giving the party "a day in court.*"

Cook vs. City of Boston, 9 Allen (Mass.), 393.

This was an action brought to recover $360 paid under protest by plaintiff to defendant as license fees for twelve wagons at $10 each, under a city ordinance, plaintiff claiming that the city had no right to exact more than $1 for each wagon. The Court directed a *pro forma* verdict for the defendant and reported the case for the determination of the Supreme Court, which held the payment to be voluntary.

DEWEY, J., delivering the opinion of the Court, said:

"We perceive no ground for maintaining this action. The "payment was made with full knowledge of all the facts in the "case, and ignorance of the law, if it existed, will not give the "plaintiffs a right of action, they having made the payment "voluntarily and not under compulsion. These principles are "familiar and have often been applied. * * *The present case "is entirely different from that of a payment to a tax collector "clothed with legal process to enforce payment, and where the "party has no day in court to be heard on his defence before the "levy of a warrant of distress.* The plaintiffs here voluntarily "sought and obtained a privilege and enjoyed it during the term "of their license. * * They could have been subjected to no "penalties for breach of the by-laws of the city in the use of "their wagons *without a full opportunity to contest their legality.* "Their case is not one where the money can be recovered back "on the ground of duress."

Taylor vs. Board of Health, 31 Pa. State Rep., 73:

This was an action to recover poll tax paid, without protest, upon foreign immigrants, under a law of the State of Pennsylvania. Held that the money was paid voluntarily and could not be recovered.

LOWRIE, J., delivering the opinion of the Court, said:

"We state the case as one of a voluntary payment of taxes, "because there is no pretense that the defendant's officers did "any more than demand the tax under a supposed authority of "the law; and this is no more a compulsion than when an indi-"vidual demands a supposed right. *The threat that is supposed "to underlie such demands is a legally harmless one; that, in case "of refusal, the appropriate legal remedies will be resorted to.*"

It was also held by the learned Judge that the action could

not be maintained against the Board of Health, because it was a mere agent of the State, and the moneys having been paid without protest, had been collected by the defendant, and applied to public purposes during a long period before the action was brought.

Mays vs. Cincinnati, 1 Ohio State Rep., 268:

It was held in this case that money paid to procure a theatre license, when issued upon the petition of the party, without objection or protest is, in a legal sense, a voluntary payment, and cannot be recovered back. Under an ordinance of the city of Cincinnati a person conducting a theatre without a license was liable, upon conviction, to a fine of not less than $5 nor more than $100.

It was stated by the learned Judge who delivered the opinion of the Court, that " to make a payment of an illegal demand in- " voluntary, it must be made to appear that it was made to re- " lease the person or property of the party from detention, *or to " prevent a seizure of either by the other party having apparent " authority to do so, without resorting to an action at law.*"

In Baker vs. City of Cincinnati (11 *Ohio St.*, 534):

Which was brought to recover a theatre license fee, paid under protest, GHOLSON, J., thought the above statement quoted from Mays vs. Cincinnati should be qualified, but the case was finally decided for the defendant, on the ground that the ordinance requiring the payment of the license fee was valid. The doctrine laid down in Mays vs. Cincinnati is in harmony with nearly all the cases upon the subject, and cannot be regarded as overruled, even in Ohio.

Jenks vs. Lima Township, 17 Indiana, 326:

This was an action brought in a Justice's Court to recover an illegal tax. On appeal to the Circuit Court, the cause was dismissed for want of a sufficient complaint. On appeal to the Supreme Court, the complaint was held sufficient, and the judgment was reversed, and the cause remanded.

PERKINS, J., said in delivering the opinion of the Court: " We " think the Court erred in dismissing the cause. The complaint " would not have been sufficiently certain, had the suit been

" commenced in the Circuit or Common Pleas Court *in showing* " *that the tax had been forcibly collected;* but according to im- " memorial usage in this State, we think *a forcible collection* " *might have been proved under the complaint.*" * * * "An " illegal tax voluntarily paid, cannot be recovered back; and the " payment is regarded as voluntary, unless it be made to pro- " cure the release of person or property from the power of the " officer."

See also the following cases:

Fleetwood vs. The Mayor, 2 Sanford Superior Court, 475.
Wilson vs. The Mayor, 1 Abbot, 4.
New York & Harlem R. R. Co. vs. Marsh, 2 Kernan, 308.
Forrest vs. The Mayor, 13 Abbott Practice Rep., 352.
Commercial Bank vs. City of Rochester, 41 N. Y., 342.
Lyon vs. Richmond, 2 Johnson's Ch. Rep., 31.

(10) The fact that the moneys were paid under protest did not make the payments involuntary. Where money is paid under such circumstances as to make the payment, in a legal sense, a voluntary one, an oral or written protest will not render the payment involuntary. Where money is involuntarily paid to an agent, it cannot, ordinarily, be recovered from the agent, after he has paid it over to his principal, unless it was paid under protest. But money voluntarily paid to an agent, or even to a principal, can not be recovered back, merely because it was paid under protest.

Fleetwood vs. The Mayor, 2 Sand. Sup. Ct. Rep., 48.
Flower vs. Lance, 59 N. Y., 610.
Peyser vs. The Mayor, 70 N. Y., 501.
Lee vs. Templeton, 13 Gray (Mass.), 480.
Benson vs. Monroe, 7 Cushing (Mass.), 125.
Cook vs. City of Boston, 9 Allen (Mass.), 393.

(11) It is respectfully submitted that there is nothing in any of the following cases cited by the Court, and by plaintiffs' counsel, upon the trial, which conflicts with the decisions above referred to.

De Bows Case, 11 Court of Claims Rep., 678:

In this case the claimant's goods were in possession of the Treasury agent, who had no authority to retain them, but ex-

acted a payment equal to one-fourth their value, *as a condition of restoring them to their owner. The money was paid to get possession of the goods.* This case comes within the principle laid down in many cases above cited, in which it is conceded, the payment was involuntary, and that the money can be recovered back.

See class "*d*" of cases, above mentioned, in which it has been held the money could be recovered.

Allen vs. City of Burlington, 45 Vt., 213:

Payment of an illegal tax was held involuntary because, if not paid within a certain time, a distress warrant would issue, *without any legal proceedings*, to collect the tax, with costs and penalties.

This case comes within class "*g*" of cases above cited, in which it is conceded nearly all the authorities agree that the payment is involuntary.

Nickodemus vs. East Saginaw, 25 Mich., 456:

In this case there was an actual threat of immediate seizure and sale of property to satisfy an illegal tax. It is not disputed that payment under these circumstances is involuntary.

American Ex. Fire Ins. Co. vs Britton *et al.*, 8 Bos., 148:

This was a very plain case of extortion, in which the defendant was forced to pay illegal fees to a public officer by threats that such officer would prevent the delivery of papers of great importance to the plaintiff, if the illegal fees were not paid.

Similar cases are cited above, in which it is held that money so extorted can be recovered, because paid under coercion in act.

Corkle vs. Maxwell, 3 Blatchford, 416:

The doctrine laid down in this case is in perfect harmony with the position taken on behalf of the defendant in this action, and is not disputed.

Cunningham vs. City of Boston, 15 Gray, 468:

Payment of head money, under unconstitutional law, there being no force or menace of force, held voluntary. This case is like that of Benson vs. Munroe, 7 Cush., 125, above cited, and the decision was to the same effect.